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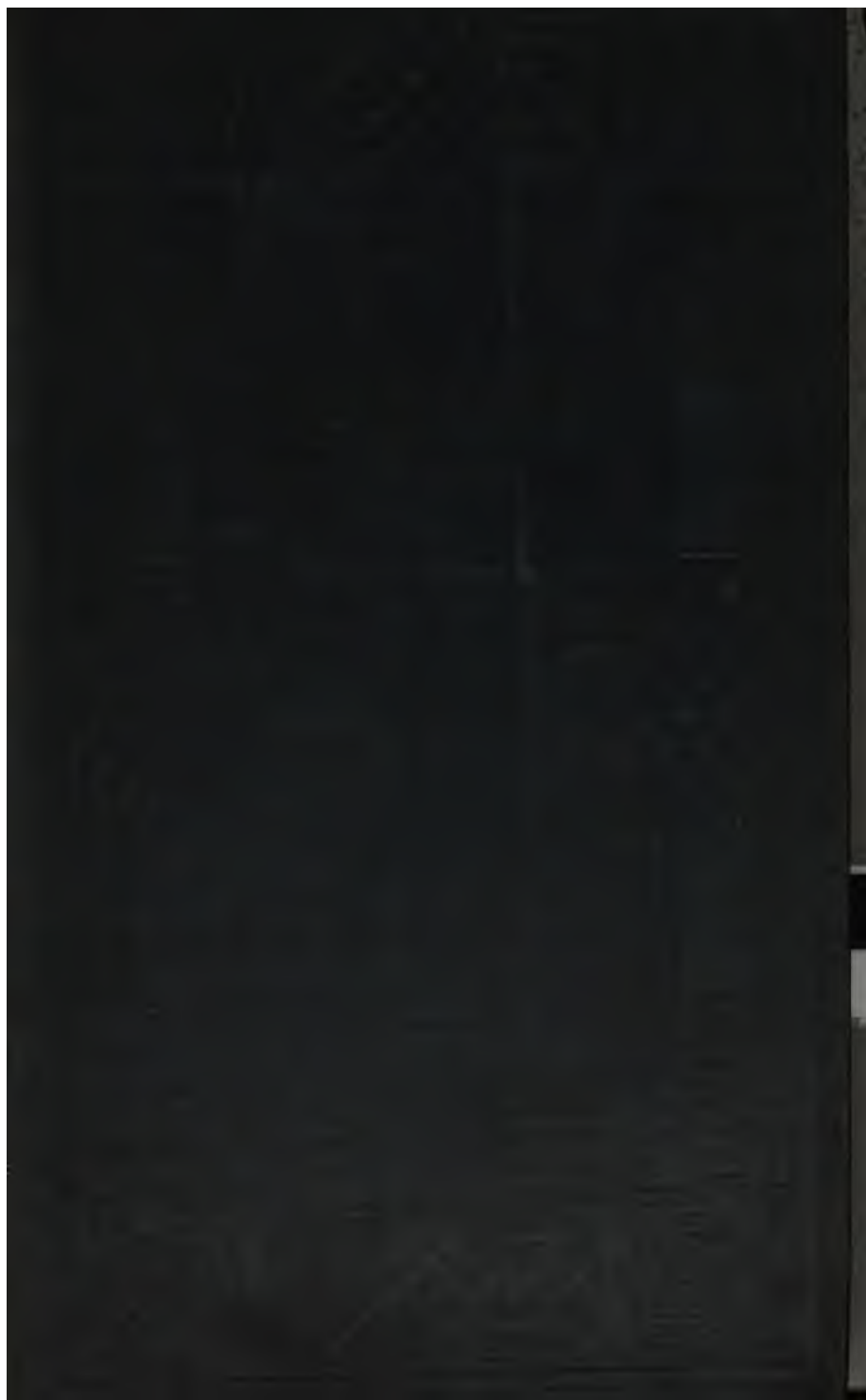
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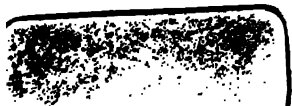
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A
MANUAL FOR SHIPMASTERS;
IN
A SERIES OF LETTERS,
ADDRESSED TO THEM, ON THEIR
Qualifications, Duties, Powers, Responsibilities, &c.,
ARISING
DURING THE COURSE OF A VOYAGE.

The Fourth Edition,
GREATLY ENLARGED AND IMPROVED, AND ADAPTED TO THE PRESENT STATE OF
THE BRITISH MERCANTILE MARINE.

BY JAMES LEES, ESQ.,
Author of "The Laws of Shipping and Insurance," &c., &c., &c.

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GEORGE PHILIP AND SON, PRINTERS.

TO
GEORGE DUNCAN, ESQUIRE,
M.P.,
THE FOLLOWING WORK IS
(WITH PERMISSION,)
RESPECTFULLY INSCRIBED,
AS A SMALL
MARK OF RESPECT FOR HIS PUBLIC CONDUCT,
AND OF
ESTEEM FOR HIS PRIVATE CHARACTER,
BY HIS MUCH OBLIGED
AND VERY OBEDIENT SERVANT,
THE AUTHOR.

EXPLANATION OF THE ABBREVIATIONS.

- Abbot.—Abbot on the Law of Merchant Shipping and Seamen, 7th edition.
- A. E.—Adolphus and Ellis's King's Bench Reports.
- Arn.—Arnault's Law of Marine Insurance and Average, 1848.
- B. Ad.—Barnwell and Adolphus's King's Bench Reports.
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- Taunt.—Taunton's Common Pleas Reports.
- T. R.—Termly Reports in King's Bench.
- T. T.—Trinity Term.
- Tyrwh.—Tyrwhitt's Reports in Exchequer.



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tion, that the proportion of British seamen necessary to the due navigation of British ships may be less than the proportion required by the Navigation Act; and so long as any such proclamation remains in force, a British ship navigated with the proportion of British seamen required by that proclamation is held to be duly navigated.⁵

It is the general business of the shipping masters, under the Mercantile Marine Act, to afford facilities for engaging seamen—by keeping registries of their names and characters—to superintend and facilitate their engagement and discharge, in manner mentioned in the act—to provide means for securing the presence on board, at the proper times, of the men so engaged,—and to perform such other duties in respect of seamen, as by the act, or afterwards, may be committed to them.⁶

In the engaging of your crew, there must for this purpose be used the printed form issued by the Board of Trade, which is supplied or sold at all shipping offices. This agreement contains the following particulars:—1. The nature, and, as far as practicable, the length of the voyage or engagement on which the ship is to be employed. 2. The time at which each seaman is to be on board, or to begin work. 3. The capacity in which each seaman is to serve. 4. The amount of wages each is to receive. 5. A scale of the provisions which are to be furnished each. 6. Any regulations as to conduct on board, fines, short allowance of provisions, or other lawful punishments for misconduct, which have been sanctioned by the Board of Trade as proper to be adopted, and which you and your men agree to adopt. And the agreement is so framed as to admit of such stipulations as may be adopted as to advance or allotment of wages, and may contain any other stipulations not contrary to law.⁷

Under the first head of this agreement, in which the nature and probable length of the voyage must be specified, it will be necessary for you to bear in mind that these must be filled up with as much precision as possi-

ble, so as to give each seaman as full an opportunity of judging as you yourself possess of the nature and probable continuance of the prospective voyage. Where the vessel is sent out a seeking ship, there can be no such specification; but should the charterer reserve power to change the vessel's destination at a particular port, or should it be anticipated that a necessary deviation may take place in the course of the voyage, these should be provided for by a special clause, stating truly the peculiarities which may arise, and engaging the seamen to continue in the vessel notwithstanding. In general, however, you can state with reasonable precision the points of the commencing and terminating of the voyage—the outward port of delivery—the foreign port of loading,—and any intermediate port or ports of call, which you yourself must trace on your charts, so as to enable your crew to judge, as nearly as possible, of the nature and probable continuance of the intended voyage. Doing this will be the means of preventing future questions with your crew; for you will attend that should these particulars not be specified with reasonable precision, the mariners are discharged from the time the destination is changed, or a deviation takes place; and, although the words “or elsewhere” be inserted in the agreement, this will not protect you, as these words must be construed in reference to the general purposes of the voyage.

For instance, in one case the voyage was described as to New South Wales and India, or elsewhere; this was held not to authorise the master to proceed from Port Jackson to New Zealand; from thence to Valparaiso and Lima; back to Sidney Cove, and then to Calcutta.⁸ Again, a voyage was described as from London to Van Dieman's Land, by the way of Cork, or elsewhere, and back to London; it was held, that this did not authorise the master to proceed to Batavia, and when arrived in the Downs to proceed thence to Rotterdam.⁹ And where the voyage was from London and back to Calcutta, it was held that the master was not

⁸ *Minerva*, Bell, 19th April, 1825; 1 Hag. 347.

⁹ *Countess of Harcourt*, 7th May, 1824; *Ibid* 248.

warranted in sailing from Madras to Prince of Wales' Island, and from thence to Calcutta.¹ These cases may be a sufficient warning to you as to the necessity of specifying with reasonable precision the limits of the intended voyage; for, after a deviation, the sailors are entitled not only to refuse to work on the new voyage, but also to claim their wages up to the day the cargo is all discharged.

In connection with the second head of the agreement, which states "the time at which each seaman is to be on board to begin work," you must take the 56th section of the act, which provides that the seaman's right to wages and provisions must be taken to commence either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens, unless he refuses or neglects to work when required, whether before or after the period fixed by agreement for beginning to work, during which period of refusal or neglect he is not entitled to wages; and by a proviso in the 9th section of the General Merchant Seamen's Act, (7 and 8 V., c. 112,) it is declared, that the absence of a seaman from his ship for any time within twenty-four hours immediately preceding her sailing from port is held to be a desertion of and from that ship.

Under the third head must be stated the capacity in which each seaman is to serve; and here, you will recollect, that the word "seaman" includes every person (except masters and apprentices indentured and registered) employed or engaged to serve *in any capacity* on board any ship.²

In reference to the amount of wages which each is to receive, as required to be stated under the fourth head, it will be well to bear in mind what is above said as to the time when the seaman's right to wages and provisions is held to commence; and it is enacted, (§ 53) that no seaman, by reason of any agreement, forfeits his lien upon the ship, or is deprived of any remedy for recovery of his wages, to which he would otherwise have been entitled; and every stipulation inconsistent

1 Cambridge, Barbour, 28th February, 1829; 2 Hag. 243. 2 § 1.

with any provision of the act, or with any other act relating to merchant seamen, and every stipulation by which the seaman consents to abandon his right to wages, in case of the loss of the ship, or to abandon any right he may have or obtain in the nature of salvage, are wholly inoperative.³

The next head of the agreement requires that the scale of provisions to be furnished each seaman be also inserted; and, in reference to these, you must attend, that the General Merchant Seamen's Act provides, (§ 12,) that, if, during the voyage, the allowance of provisions which each seaman has agreed to receive be reduced to one-third the quantity, or less, he is entitled to 4d. per day; and if the reduction be more than one-third, he is entitled to receive 8d. per day, during the period these respective deductions may be made,—these allowances being payable in addition to and recoverable as wages; but the present Merchant Marine Act enacts, (§ 80,) that no seaman or apprentice is entitled to any pecuniary allowance on account of any reduction in the quantity of provisions furnished to him during such time as he wilfully and without sufficient cause refuses or neglects to perform his duty, or is lawfully under confinement for misconduct, either on board or on shore, or during such time as such quantity may be reduced in accordance with any regulation for reduction by way of punishment, contained in the agreement.

It seems only necessary, in reference to what has to be inserted in the agreement, to notice further the new regulations as to advance and allowance notes. Section 7 of the Seamen's Protection Act, (8 and 9 V., c. 116,) is repealed, so far as relates to these;⁴ and it is now enacted that no advance note must be made except in the forms sanctioned by the Board of Trade, which contain blanks for the number of days within which the notes are to be payable, and such other blanks as may be necessary; and this form must not be altered, except by duly filling up the blanks therein; and no advance of wages must be made, or advance note given, to any person, unless the seaman himself, and unless the agree-

ment contains a stipulation for the same, and an accurate statement of the amount thereof; nor can such note be given to any seaman who signs the agreement before a shipping master, unless in his presence, or, in the case of a substitute, until four hours after the agreement has been so signed.⁵ Should any advance of wages be made, or advance note given, to any seaman in any such manner as to constitute a breach of any of the above provisions, his wages are recoverable by him as if no such advance had been made or promised; and, in case of an advance note so given, no person can be sued thereon unless he was a party to such breach.⁶ And when an advance note is discounted for a seaman, he must sign or set his mark to a receipt indorsed thereon, stating the sum actually paid or accounted for to him by the person discounting it; and after the expiration of ten days from the final departure of the ship from her last port of departure in the United Kingdom, the person so discounting can sue for and recover the amount promised by the note, with costs, from the owner or his agent, either in the County Court or in the summary manner in which seamen are enabled by the Merchant Seamen's Act to sue for and recover their wages where the amount is under £20. In so proceeding, it is sufficient for the person discounting to prove that the note was given by the owner, or by the master, or some other authorised agent, and the same was discounted to and receipted by the seaman; and unless the contrary is proved the seaman is presumed to have gone to sea with the ship, and to have duly earned, or to be earning, his wages.⁷

As to the allotment of any part of a seaman's wages for his wife and family, formerly known as "monthly notes," but for which there is now a place in the agreement, the act enacts that all stipulations for the allotment of any part of a seaman's wages during his absence must be inserted in the agreement, and must state the amounts and times of the payments to be made.⁸

With regard to foreign-going ships, this agreement (unless in the special case of agreements made out of the United Kingdom, and of agreements with substitutes,

as after mentioned,) must be signed by each seaman, in the presence of a shipping master; and he must cause the agreement *to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and the shipping master attests each signature.* When the crew is first engaged, the agreement must be signed in duplicate; and one part is retained by the shipping master, and the other part contains a special place, or form, for the descriptions and signatures of substitutes engaged subsequently to the first departure of the ship; and this copy has to be delivered to the master.⁹

In the special case of seamen engaged out of the United Kingdom, and of substitutes engaged in the place of seamen who have duly signed the agreement, and whose services are lost, within twenty-four hours of the ship's putting to sea, by death, desertion, or other unforeseen cause, the engagement may, when practicable, be made before some official shipping master, duly appointed, either in the United Kingdom, or in her Majesty's dominions abroad, for the purpose of shipping seamen, and in the manner before specified for ordinary cases in the United Kingdom. But in special cases, whenever the engagement is not so made, the master must, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen, either before some consular officer,* or before some officer of customs, or on board the ship; and thereupon, the seaman signs the same in presence of such officer, or of some other witness, who attests his signature. Nothing contained in the act, however, dispenses with the sanction for shipping seamen at foreign ports, required by the General Merchant Seamen's Act, as will be noticed in a subsequent letter.¹

And with respect to home-trading ships, † crews or

⁹ § 46. ¹ 47.

* This expression includes Consul-General and Vice-Consul.

† This expression includes every ship, to which the act applies, employed in trading or going within the following limits, viz:—the coasts of the United Kingdom, the islands of Guernsey, Jersey, Alderney, Sark, and Man, and the continent of Europe, between the river Elbe and Brest, inclusive.

single seamen may, if the master thinks fit, be engaged before a shipping master, in the manner before directed with respect to foreign-going ships; and in every case in which the agreement is not so made, the master must, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to each seaman, and the seaman thereupon signs the same in presence of a witness, who attests his signature.²

The fees payable upon the engagement of seamen before shipping masters must not exceed the sums specified in schedule B, and subject to this restriction, that the Board of Trade can fix and alter the amount of fees, of which scales are prepared and placed conspicuously in the shipping offices; and unless the fees payable thereon are first paid, the shipping masters, their deputies, clerks, and servants may refuse to proceed with any such engagement.³ Every owner or master engaging a crew or a seaman in a shipping office, or before a shipping master, must pay to the shipping master the whole of the fees payable by the act in respect of such engagement; but he may, for the purpose of in part reimbursing himself, deduct from the wages of all persons, (except apprentices,) and retain any sum not exceeding the sums specified in schedule C. annexed to the act.⁴

Every erasure, interlineation, or alteration in any such agreement, (except additions made as aforesaid, for shipping substitutes, or any other person engaged subsequently to the first departure of the ship,) is wholly inoperative, unless proved to have been made with the consent of all the parties interested, by the written attestation (if made in her Majesty's dominions) of some shipping master, justice, officer of customs or other public functionary; or (if made out of her Majesty's dominions) by the similar written attestation of a consular officer, or, where there is no consular officer, of two respectable British merchants.⁵

In the case of foreign-going ships, the master must, before quitting the first port of departure, produce and

show to the collector or controller of customs, the agreement signed and attested in manner before mentioned ; and no officer of customs must clear any such ship outwards, or permit her to proceed to sea, without this production ; and in every case in which a foreign-going ship is delayed for the want of this production of the agreement, the tide-waiters left on board must be maintained at the expense of the owner or master until it is produced, and clearance can be delayed until that expense be satisfied.⁶

In the case of home-trading ships, no agreement must extend beyond the next following 30th June or 31st December, or the first arrival of the ship at her final port of destination in this country after such date ; and within twenty-one days after the 30th June and 31st December, in every year, the owner or master of every such ship must transmit or deliver to some shipping master or officer of customs in the United Kingdom, every agreement made within the six calendar months next preceding each of these days, and thereupon, the shipping master or officer of customs gives to the master or owner, a certificate of such transmission or delivery. No officer of customs must give to the master or owner, a transire, or other customs' document necessary for the conduct of any such ship, without the production of this certificate.⁷

At the commencement of every voyage or engagement, you must cause a legible copy of the agreement (omitting the signatures) to be placed on board in such a manner as to be accessible to the crew ;⁸ but any seaman can bring forward evidence to prove the contents of any agreement, or otherwise to support his case, without producing, or giving notice to produce, the agreement or any copy thereof.⁹ And no seaman, by reason of any agreement, forfeits his lien upon the ship, or is deprived of any remedy for the recovery of his wages, to which he would otherwise have been entitled ; and every stipulation which is inconsistent with the provisions of the Mercantile Marine Act, or of any other act relating to seamen, and every stipulation by which

6 § 50. 7 § 51. 8 § 54. 9 § 52.

any seaman consents to abandon his right to wages in case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, is wholly inoperative.¹

By section 26 of the Merchant Seamen's Act, you were required, before leaving your first port of departure in the United Kingdom, bound to parts beyond seas, to transmit or deliver, or cause so to be, to the collector and controller of customs at that port, a list, signed by yourself, of the names of your crew (including apprentices), with the number of their registered tickets, and the capacity in which they were serving on board, according to the form set forth in the schedule annexed to the act; and should any subsequent change take place in the crew before finally leaving the United Kingdom, you or your owner had, upon such change taking place, to apprise the collector and controller at the port where it occurred, by transmitting an amended list in the same form. But by section 88 of the present Mercantile Marine Act, no such list is now required; and the master of every foreign-going ship, the crew of which has been engaged before a shipping master, must, before finally leaving the United Kingdom, sign and send to the nearest shipping master, a full and accurate statement, in the form sanctioned by the Board of Trade, of every change which takes place in his crew before finally leaving the United Kingdom.²

The following penalties are imposed upon you for the neglect, or the non-observance of these enactments, as to the engagements of seamen. 1st.—In case you carry any seaman to sea without entering into an agreement, in the form and manner, and at the place and time, required by section 46; or, 2nd,—if the agreement or copy thereof is not delivered or transmitted to a shipping master or officer of customs, at the time and in the manner as required by section 47,—then, for each of such offences, you, as master, in the case of a foreign-going ship, or yourself as master, or your owner, in the case of a home-trade ship, are liable to a penalty not exceeding £10; and 3rd,—if a copy of the agreement is not

placed on board in the manner directed by section 54, for such offence you are liable to a penalty not exceeding £5. And every person who fraudulently alters, or procures to be altered, or assists in altering, or who makes or procures to be made, or assists in making, any false entry in ; or who delivers, or procures to be delivered, or assists in delivering, a false copy of the agreement,—that person, for each such offence, can either be deemed guilty of a misdemeanor, or, if not previously prosecuted as for a misdemeanor, he is liable to a penalty not exceeding £50, or to imprisonment not exceeding three months, with or without hard labour, as the justices or court hearing the case may think fit.³

Should any seaman, on or before being engaged, wilfully and fraudulently make a false statement of the name of his last ship, or last alleged ship, or wilfully and fraudulently make a false statement of his own name, he forfeits, out of the wages he may earn by virtue of such engagement, a sum not exceeding £5, which, subject to reimbursement of loss and expense (if any) occasioned by any previous desertion, has to be paid to the Board of Trade.⁴

Each seaman's right to wages and provisions is to be taken to commence, either at the time he begins work, or at the time specified in the agreement for his commencement of work, or presence on board, whichever first happens ; but this enactment does not prejudice the infliction of any lawful punishment, forfeiture, or fine ; nor is any seaman entitled to wages for any period during which he refuses or neglects to work when required, whether before or after the time fixed by the agreement for his beginning to work.⁵ And should any seaman have signed the agreement, but be discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, he is entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him, not exceeding a month's wages ; and on leading evidence satisfactory to

the justice hearing the case of his having been improperly discharged, he can recover this compensation as wages duly earned.⁶

Having thus engaged your crew in terms of the statute, and fixed the rate of wages which each seaman is to receive, your next duty is to arrange with each the advance of wages he requires, or the advance note which is to be given him.

In reference to these, as before mentioned, the statute enacts, that no advance note must be made, except in the terms sanctioned by the Board of Trade, which contain blanks for the number of days within which the notes are payable, and such other blanks as may be necessary, and that form must not be altered except by duly filling up the blanks therein. No advance of wages must be made, or advance note given, to any person but the seaman; nor must the advance be made, or advance note given, unless the agreement contain a stipulation for the same, and an accurate statement of the amount thereof; and no advance note must be given to any seaman, who signs the agreement before a shipping master, except in the presence of that shipping master, or, except in the case of a substitute, until four hours after the agreement has been so signed.⁷

If any advance of wages is made, or any advance note given, to any seaman, in any such manner as to constitute a breach of any of the above provisions, the wages of that seaman are recoverable by him, as if no such advance had been made or promised; and no person can be sued on an advance note so given, unless he was a party to such breach.⁸

Whenever an advance note is discounted for a seaman, he must sign or set his mark to a receipt endorsed on the note, stating the sum actually paid or accounted for to him by the person discounting the same; and the person so discounting may, after the expiration of ten days from the ship's final departure from her last port of departure in the United Kingdom, sue for and recover the amount promised by the note, with costs, either from the owner, or from the agent who has drawn or author-

ised the drawing of such note, either in the county court, or in the summary manner prescribed by section 13 of the General Merchant Seamen's Act, enabling seamen to sue for and recover wages not exceeding £20. In any such proceeding, it is sufficient for the person discounting to prove that the note was given by the owner, or by the master, or some other authorised agent, and that the same was discounted to and receipted by the seaman; and he is to be presumed to have gone to sea with the ship, and to have duly earned, or to be duly earning, his wages, unless the contrary is proved, either by production of his register ticket, or by the official statement of the change in the crew caused by his absence, made and signed by the master, as before required, or in some other manner.⁹

All stipulations for the allotment of any part of a seaman's wages during his absence, must be inserted in the agreement, and the amounts and times of the payments to be made must be also stated; and all allotment notes must be in the forms sanctioned by the Board of Trade.¹

You also require to bear in mind, that so long as register tickets are in use, the General Merchant Seamen's Act declares it not lawful for you to carry to sea any seaman, being a subject of her Majesty, until you have first obtained from every such seaman, or other person, his register ticket,² under a penalty of £10 for each such seaman.³

If, after signing the agreement, as already mentioned, any seaman or any apprentice wilfully neglects or refuses to join his ship, and then or afterwards is found, or arrives at any place in which there is a court or justice capable of exercising jurisdiction under the act, he can, on due proof of the offence, and, where practicable, of a proper entry thereof in the official log-book, be summarily punished by imprisonment, for a period not exceeding twelve weeks, with or without hard labour, at the discretion of the court or justice; but if required by the master, owner, or agent, the court or justice, instead of committing the offender to prison, can cause

9 § 61. 1 § 62. 2 § 2. 3 § 4.

him to be conveyed on board the ship, for the purpose of proceeding on the voyage, or can deliver him to the master or mate of the ship, or the owner or his agent, to be by them so conveyed; and in such case can also order any costs or expenses properly incurred by or on behalf of the master or owner, by reason of the offence, to be deducted from any wages he may have then earned, or may afterwards earn, under the then existing engagement.⁴

The Navigation Act (12 and 13 V., c. 29) repealed the 37th section of the General Merchant Seamen's Act, which required the master or owner of every ship of the burden of 80 tons or upwards, (except pleasure yachts) to have on board, at the time of her proceeding from the United Kingdom, and at all times when absent from the United Kingdom, certain apprentices in proportion to the amount of register tonnage, with their registered indentures, assignments, and register tickets, under a penalty of £10 for each wanting or deficient; but except in this respect, apprentices must be bound in terms of that act, and the other regulations in it still apply to them.

You must now commence to keep the official log-book and muster-roll, the uses of which will be seen in subsequent letters.

I am, &c.

LETTER III.

Taking in cargo at home port—ballasting vessel—and kind of ballast to be used—dunnage—quantity to be used—damages for want of—tackling, &c.—damages to goods through default of—commencement of responsibility for goods—rules as to—in timber trade—care of goods after they are on board—manifest and cargo-book—when keeping of them begins—what should be entered in them—receipt for goods—what it should contain—when it should be received back—stowage of goods—duty incumbent on master as to—full cargo—partial cargo—precautions against shifting—cargo of grain, &c.—general cargo—overloading vessel—deck loads—taking in cargo at foreign port—when vessel must be there by a certain day—instances of failure—should neither be deviation nor delay—instances of latter—must be at port at all events—unless exception of stress of weather, &c.—duty on arrival—lay days—how reckoned—demurrage as to—loading—when ceases—bill of lading must only be given in exchange for the receipt—instance of danger in not doing so—bills of lading should correspond with goods in manifest or cargo-book—must not state what is contrary to the truth—not conclusive between shipper and master—but is so, if in the hands of an onerous endorser—instances as to—precautions to be used by master in signing—exceptions in.

GENTLEMEN,

Having thus seen the mode of engaging the seamen, let us proceed now to the taking in of a cargo, and let me assume that this is to be done at a home port.

I need hardly say that your first care is to have your vessel properly ballasted; and that, where it can possibly be obtained—as it can almost always be easily obtained at the ports in this country—stone ballast is to be preferred, unless you have permanent iron ballast. On no account ought you to take sand ballast, where stone or such like ballast can be had; and even in a case of necessity, when you are compelled to take sand ballast, you must use every possible means to prevent its entering into the pumps and destroying them. Even in small quantities the sand may destroy the boxes of the pumps

and render them unfit for service, at a time when you cannot get them repaired; and it may as readily choke the pumps altogether. Should you, therefore, be, on any occasion, under the necessity of using sand ballast, it is your duty carefully to caulk the ceiling, clear the timbers, and protect, with pitched canvas, matting, &c., the pumps, so that none of the sand may get admission.

The next essential requisite, to which you must particularly attend, is that your vessel be properly dunnaged, and in a fit state to receive and carry her cargo. You are, of course, aware that the purpose of dunnage is to protect the cargo from the leakage of the vessel; and the extent of dunnage which must be used will necessarily vary, according to the condition of the vessel and the nature of the cargo. I am not aware that there is any general rule established or practised as to dunnage, further than the common practice and understanding, that there should be at least six inches in the bottom and nine in the bilges, and that, where the cargo is in bags, there should, in addition, be matting all the way up the sides. Should you neglect thus properly to dunnage the vessel, and should the cargo, in consequence of the want of proper dunnage, receive damage from the leakage or bilge-water, the owner of the goods will be entitled to set off his claim for these damages against a demand for the freight.¹

Another requisite which also requires your particular attention, is, that the ropes, tackling, &c., necessary for hoisting the cargo on board, be in proper order and sufficient for that purpose. It is an old-established rule that, when any part of the cargo is injured, spoiled, or lost, through the default or breaking of the ropes or apparatus, the damage lies upon you or your owners; and it has been even held, that should a cask be accidentally staved in letting it down into the hold, you and the owners will be liable to make good the loss.²

The time when your responsibility for goods to be shipped commences, must necessarily vary, according to the custom of different ports, and to the kind of

1 Taylor v. Forbes, 2nd December, 1830. 9 S. D. B. 113.

2 Abbot, 346.

cargo you are to load ; but, in general, when goods are to be shipped from the quay, your responsibility commences from the moment of their being laid down on the quay ; and a delivery of goods to your mate, or any of the crew, whom you may appoint to superintend the loading, will be sufficient to charge you.³ If the ship's boats are sent to the shore for the goods, your responsibility commences with the delivery of them into the boats ; but if the owners of the goods send boats, or a lighter, from the shore to the ship with them, the responsibility of this conveyance lies with the owner himself ; and should they receive damage, he must bear the loss, or pursue the owner of the boats or lighters for it.⁴ In the timber trade, where it is the practice to send the ship's boats to tow the rafts from a distance alongside the vessel, your responsibility will begin from the time these rafts are taken in tow ; but, if the freighter has to bring it alongside the vessel, your responsibility only commences from the time that each raft may be made fast to the vessel. In this trade, it is also necessary that the port-holes of the vessel should be of a size sufficient to admit the logs of the country from which the timber is to be brought. I need scarcely add, that when the cargo is once on board, it must be carefully kept from theft or embezzlement by the crew and all others, otherwise you and your owners will be answerable for all such loss ; and this precaution is the more necessary to be attended to on board general ships, the crews of which, if I am rightly informed, make no scruple of pilfering such small articles as are accessible to them.

With the receiving of the cargo on board, you must begin in the foreign trade to fill up your manifest, and in the home trade to keep your cargo book. Both the one and the other are, I believe, entrusted to the mate or some other of the crew ; but, although a delivery to such person may be sufficient to make you and your owners responsible for the goods so delivered, it will be no excuse for you if the goods are found damaged or deteriorated, or do not turn out to the quantity shipped, that, at loading, these goods were delivered to the mate

3 Holt, 387. 4 Lyon v. Wells, 1804. 5 East. 528.

or other person in charge of the loading. You, as a common carrier, are responsible for the safety of all goods delivered to the person in charge of the ship; and, although I do not say you are to be constantly at your vessel during the time of lading, yet you ought to be absent as little as you possibly can. And when any part of the goods are received on board, you or your mate, whilst they are stowing in the hold, ought to enter in the manifest or cargo-book, the date of their being so received—the description of the goods, and the state of their package—the name of the shipper,—and the particular marks upon the goods, with any general remarks upon their condition, or liability to deterioration or corruption, which may be called for.

It is a common practice after the goods are on board, that you, or the person in charge of the lading, grant a receipt for the goods received. This receipt ought, strictly, to be signed by yourself; but, whether it be or not, it should contain nothing more than an exact transcript of the entry of the particular goods in the manifest or cargo-book. You will, thereafter, be required to sign the usual bills of lading, which I shall come to by-and-by; but you should be extremely careful not to sign a bill of lading, until you get possession of the previous receipts, and to deliver the bills of lading to no one but to the person who can deliver you these receipts in exchange for the bills of lading. By attending to this, and seeing that your receipt is destroyed when you deliver the bills of lading, you may save yourself from the disagreeable chance of the bills of lading being in the hands of one person, and the receipts in the hands of another, and both making a claim against you for the self-same goods.

The stowage of the cargo on board next claims your attention. In some ports, this may be done by persons who make the stowage of vessels their special calling, or by persons engaged by the merchant shipper, but, even then, the cargo should, for the safety of the vessel, be stowed under your superintendence and direction, as it is a duty specially incumbent upon you so to stow and arrange the cargo that there may be no possibility of

its shifting, or of the different articles of which it may consist injuring one another, and that it cannot be damaged by the motion or leakage of the vessel.⁵ By an old Scotch statute, the punishment of improper stowage is, the loss of the freight, and repairing the damage done to the merchant; and this is the universal law of almost all maritime countries.

Where the cargo is of one kind, as of flax, cotton, hemp, tobacco, &c., the danger is not so great, when there is a full cargo, and when it has been properly secured, unless, perhaps, the cargo may have been too much compressed, or too tightly screwed into the hold, in which case danger is to be apprehended from its expanding or heating; but it is when a partial cargo is taken in that the greatest danger is to be apprehended from its shifting. You can easily understand that when, with a partial cargo not properly secured, the vessel is thrown on her beam ends, and the cargo shifts over to the other side lying in the water, it is next to impossible again for the vessel to right herself, and she must consequently fill with water and go down. How many vessels may have been lost from this cause, and how extremely cautious ought this to make you in stowing a partial cargo! In such a case, you ought to secure every tier of the goods firmly in its own place, by covering it with strong boards, kept down by stanchions fastened to the timbers above; and, in cargoes of grain and such like, additional precautions must be taken. Commonly the grain is thrown loose into the hold of the vessel, and you know it is quite a common occurrence that although the vessel may be as full as she can hold at sailing, she will on arriving at her port of destination not be nearly full. This is occasioned by the cargo being hastily loaded, and neither care taken nor time given for it to settle properly; and, therefore, in loading such a cargo, it will require the greatest attention from you while loading to settle the cargo properly, by driving long wedges into the grain, and using the utmost precaution properly to confine and secure it by strong division-boards and stanchions, so as to guard against the possibility of its shifting.

⁵ Abbot, 346.

In stowing a general cargo, or a cargo consisting of various kinds of goods, it is a general rule, and a very ancient one, that soft goods or goods apt to take damage are not to be stowed below, and over them hogsheads or puncheons from which leakage may arise, and by which the goods below may receive damage. All laws agree that for the damage thus sustained you are responsible; and, therefore, it is your bounden duty, in loading such a cargo, to take special care that casks of liquids or salt be not stowed upon bales of silks, cotton, or woollen goods.

Another danger you must guard against is, not to overload the vessel. Of course, you are entitled, and the merchant charterer is bound, to load the vessel—not merely according to the number of tons which may be specified in the charter-party,—but to that extent which the vessel is capable of carrying with safety;⁶ but it is a general rule that, notwithstanding, there must be sufficient room left for the proper working of the vessel, as well as for her own furniture and the provisions of the crew; and you should also be aware, that if the vessel be overloaded she is not seaworthy.⁷ In some trades it is a common practice to carry loads upon deck; but as this may materially impede the proper working of the vessel, you ought, if at all practicable, to avoid doing so; and in no case should you do so without the previous consent of the merchant shipper, so as to save yourself from all questions of damages with the merchant, in case these goods should be damaged, or in the event of their being thrown overboard in a storm. In some countries the loading of goods on deck is expressly prohibited, and it is so in the timber trade between this country and America or Honduras.⁸ How far goods laden on deck and thrown overboard for the safety of the ship and cargo, are entitled to the benefit of a general contribution, will be considered afterwards.

When the vessel is freighted to proceed to a foreign port and load a cargo, the first thing you have to attend

⁶ *Hunter v. Fry*, 28th April, 1819. 2 B. A., 421.

⁷ *Weir v. Aberdeen*, 27th January, 1819. 2 B. A., 320.

⁸ 5 and 6 V., c. 17.

to, is to be at that port by the time specified in the charter-party. In proceeding, therefore, to the port of loading, you must pursue the usual and direct course, without making any unnecessary deviation, and without entering into any intermediate voyage; and should you, in consequence of either, be too late in arriving at the port of loading, it will then be in the option of the charterer to load the cargo or not. I will give you an instance or two.

Thus, a vessel was freighted, by charter-party, from London to proceed to the Cape, and having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter was to load on board a cargo of cotton for England; the master arrived at the Cape, and might have proceeded on his voyage in two days, but remained there ten, taking in cattle for the Mauritius on his own account, and he went round by the Mauritius in his way to Bombay, his port of lading, at which he arrived six weeks later than he would otherwise have done had he proceeded thither direct; in the meantime other vessels had arrived, and the freighter's agents, in consequence of the delay and deviation, refused to load the cargo; and, through the master's conduct, the freighter was not found liable in damages for the refusal to do so.⁹

Again, in another case, a vessel was chartered in October, 1832, to go in ballast from Portsmouth to St. Michael's, and to bring back a cargo of fruit direct to London; the charterer was to be allowed thirty-six running days for loading and unloading, to commence on the 1st December then next; and if the vessel did not arrive at St. Michael's by the 31st January, 1833, the charterer was to be at liberty to rescind the charter-party. Had the master proceeded direct to St. Michael's, about the time of entering into the charter-party, there was a reasonable expectation that the cargo would have been delivered in London about the 1st January; but, in place of doing so, he made an intermediate voyage to Oporto, returned again to Portsmouth, and then sailed for St. Michael's, where he arrived before the

⁹ *Freeman v. Taylor*, 23rd November, 1834. 8 Bing. 124.

31st January, and was loaded with oranges, and arrived in London on 1st February; but by this time there was a glut of oranges in the market, and the price had fallen considerably; and in an action for the loss, the master was held liable to the charterer.¹

These two examples may convince you, that, when the vessel has to proceed to a port of loading abroad, there is an absolute necessity for your doing so by the shortest and most direct course, and making your arrival there your sole object, so as to restrain you from entering into any subordinate voyage or engagement which may have the effect either of taking you out of that course or of retarding your progress. You see, that if the vessel is beyond the time fixed in the charter-party for arriving, the freighter may load the vessel or not, as he pleases; and, should he not load the vessel, I need scarcely remark what a loss that must entail on your owners, or, that, though the merchant do load the vessel, yet, if through the delay in the vessel's arrival, the goods come to a falling market, you and your owners may be liable to him for the loss he may thereby sustain. But, besides the duty which you thus owe to the charterer of the ship, you must also bear in mind that there are the underwriters to deal with, and that either deviation or delay may forfeit the insurances. I will take up the matter of deviation in another letter, but here I will just give you one example of the effects of the master's delaying, for his own purposes, to proceed direct to his port of loading, in a question with the underwriters.

A vessel was freighted to proceed from London to Singapore, for a cargo to Europe, and the usual liberty was given to sail, touch, and stay at any place whatever, and to load, unload, and reload, for all necessary purposes whatever. The vessel sailed from London in September, 1833; but, in place of proceeding to Singapore, was detained by the captain, for his own purposes, in Van Dieman's Land, and did not arrive at Singapore till the 30th March, 1835, and sailed with her cargo from thence on the 3rd May, that year. This was an action on a policy of insurance on the freight from Singapore to

¹ *McAndrew v. Adams*, 28th May, 1834. 1 Bing. N. 29.

Europe; and the jury found that the delay was unreasonable. The court held that, by so long a postponement of the risk, the underwriters were discharged.²

And where there is an express condition that the vessel shall sail for, or arrive at, her outward port of loading by a certain specified day, the vessel must sail for, or arrive at that port by that day *at all events*; and it will be no excuse for the vessels so arriving that she was detained by contrary winds and bad weather. If the vessel do not arrive, not only is the freighter discharged from his contract, but you will be liable to him in damages.³ If, however, there is an exception in the charter-party, that should the vessel not arrive at the port of loading, in consequence of stress of weather, or other unavoidable impediment, the freighter is still to be bound to load the cargo; this may have the effect of making him liable for the freight, or for the damages consequent on his failure to load, provided it can be undoubtedly established that the non-arrival was occasioned solely by stress of weather, or other such unavoidable obstruction as could not, by any reasonable degree of foresight, have been prevented.⁴ But, should such a case occur to you, you must be careful to make your log-book contain evidence of the cause and continuance of the delay, as well as to provide other unexceptionable evidence, by which that delay can be established, if necessary.

It is not necessary for me to say more as to the absolute necessity, where you are to be at a foreign port by a certain day, of your proceeding there in the direct course,—and being there, at all events, by that day. By doing so, you will avoid all vexatious questions with the freighter, and save yourself and your owners from all liability for damages. I certainly should consider that shipmaster altogether unworthy of his situation and of the trust reposed in him, who, when he knows the express terms of his charter-party, can, either for his own advantage or the emolument of his owners, engage in any subordinate traffic or voyage, which may have a chance of delaying his vessel beyond the

² Mount v. Larkins, 25th Nov., 1834. 8 Bing. 108.

³ Abbot, 270. ⁴ Granger v. Dent. 1 L. W., 270.

appointed time, and thereby run himself and his owners into scrapes. Even when the charter-party is, in the general terms, to proceed "with all convenient speed" to the port of lading, you are not authorised to deviate from the usual and ordinary course, nor to engage in any intermediate voyage, which may have the effect of delaying your arrival at the port beyond the usual and ordinary time of the voyage, as, by doing so, you leave it in the freighter's power to load or not, as he pleases, and to hold you and your owner liable in damages.

Having arrived at the foreign port of loading, your duty is to put yourself under the charge of the agent for the shippers, or the ship, if there be one. To one or the other of these you will have to entrust the clearing of the vessel, and doing what is necessary to permit her to load, of which it cannot be expected that you yourself can have a competent knowledge. The observations which I have already made as to the loading of the cargo and the commencement of your responsibility, apply equally to the loading of a cargo in a foreign as in a home port. In both, the particular cargo must be laden according to the custom of the port at which it is to be laden; and I need not repeat what has been already said as to this.

It may be proper to say a few words here as to lay-days and demurrage. You know that the lay-days are those days which are allowed to the shipper either for loading or unloading the vessel. These are either running or working days; the former including Sundays, when not expressly excluded, and there is no usage to the contrary, and the latter excluding Sundays and custom-house holidays.⁵ Where the ordinary and customary time for loading is allowed, that must be regulated by the custom of the particular port in loading the particular kind of cargo to be shipped. In loading, these lay-days cannot commence until the vessel be at the place of loading, and in a state ready to receive her cargo. It is generally the duty of the crew, or of individuals hired for the purpose, to take the cargo on board; but if, in the charter-party, the shipper is bound to put

⁵ Abbot, 304.

it on board at his own expense, and if he fail or refuse to do so, you are entitled to employ men at his expense so to do.⁶ If the vessel be not fully loaded at the time of the expiry of the lay-days, it is your duty to take a protest against the shipper, stating the terms of the charter-party,—the number of lay-days allowed,—the time at which the vessel was ready to receive her cargo,—and the date of the expiry of the lay-days, without the vessels being loaded or fully loaded;—and, therefore, protesting that the vessel, thenceforth, shall lie at the demurrage stipulated in the charter-party. You must, of course, employ a man of business to do this, as well as any other ship's business; and, in doing so, you should make it a rule to employ a respectable agent, whose character will be a guarantee for the soundness of the advice he may give, and on whom you can depend for doing his business in a proper, business-like manner, and for charges the same, if not more moderate, than many of the inferior grade of the profession.

It seems to be a general rule that if the vessel be not ready, or the cargo not prepared, at the time appointed for loading, either party may disannul the contract,—the freighter may look out for another ship, and you for another cargo; but it is seldom, I suppose, that this will be the case. Where the freighter is responsible, there will scarcely be any occasion to do so; because, if he fail to load the cargo, or to complete the loading of the vessel in terms of his bargain, he will be liable to make good the loss arising either from the want of the cargo or from the deficiency in loading. And in such a case, the prudent course will be for the master to remain until the expiry of the days of demurrage, before he look out for another lading. But, where there are good grounds to suspect the credit or solvency of the freighter, there is less danger, on his failing to load, in taking other goods, or in completing the loading with the goods of others, so as to secure a full freight, and thereby lessen the damages which have to be claimed.⁷

The term *demurrage* is applied both to the days which it is stipulated the vessel shall wait for the lading,

⁶ Fletcher v. Gillespie. 3 Bing. 635. ⁷ Abbot, 249.

after the expiry of the lay-days, and to the sum which it has been agreed the freighter shall pay for each of these days. The questions which have arisen, as to the lay-days and demurrage at the unloading of the cargo, will come afterwards; but here it may be mentioned, that it is no excuse for not loading the vessel within the lay-days, that the port of lading was frozen up, or the rivers by which the goods were to be conveyed to that port;⁸ nor by a pestilential disorder having broken out at the port of loading, and all public intercourse having been prohibited at that port.⁹ But the demurrage ceases so soon as the vessel is loaded and ready for sea, although she may be detained by contrary winds or tempestuous weather;¹ nor does the demurrage revive, although, after having sailed, the vessel be driven back to the port by adverse winds, and be there frozen up.²

I have refrained, until now, saying anything as to the bill of lading. This is a most important document; and it is absolutely necessary that you distinctly understand the rules and obligations attendant upon it. There are, generally, three bills of lading signed for the goods, all of the same tenor and date; and any one of these being performed—that is, the goods being delivered in terms of it—the others become void. It is your written acknowledgment that you have received the goods mentioned in it, to be carried to the place of destination; and when a receipt has been previously given for the goods, as already mentioned, you should be very careful to give the bills of lading to no other person than the one who can give you up the receipt for them. By using this precaution, you will avoid the possibility of getting into a scrape, as you might do, were the receipt granted to one party, and the bill of lading signed to another. For example:—goods were sent on board a vessel, and a receipt was given for them, as received for and on account of the shippers, who had previously sold them to another individual; that individual sold them to a third party, who went to the shipmaster and obtained a bill of lading

⁸ *Barrett v. Dutton*, 1815. 4 Camp., 333.

⁹ *Barker v. Hodgson*, 27th Nov., 1814. 3 M. S. 267.

¹ *Lannoy v. Werry*. 2 Bro., P. C. 60.

² *Jameson v. Lawrie*, 10th Nov., 1796. 6 Bro., P. C. 472.

for the goods in his own name; but the shipmaster did not take the precaution to obtain the receipt in exchange. The individual to whom the goods had been first sold failed, and the shippers brought an action on the receipt against the shipmaster for delivery of the goods to them, and they were found entitled to them,—it being held, that it was contrary to the course of business, and to the shipmaster's duty, to give up the bill of lading without the receipt.³

It is too common a practice for any clerk in the office of the shipping agent to subscribe the bills of lading for the master; but you should be particular, where at all practicable, to sign the bills of lading yourself, and taking care the goods entered in them correspond with the goods entered in your manifest or cargo-book. I need scarcely say that bills of lading must not be signed until the goods are actually on board, and they must not contain anything that is contrary to or inconsistent with the truth. Although, as between the shipper himself and you or your owner, the bill of lading is not conclusive as to the exact quantity of the goods shipped, and is looked upon, in law, as merely a receipt, which may be opened up to the effect of admitting evidence of the real facts,—as where a master was induced, through fraud of the shipper's agent, to sign a bill of lading for 890 bags of pepper, whereas only 790 bags were shipped,⁴—yet, where the bill of lading is in the hands of a third party, as of an endorsee for value, it will render you or your owners liable according to its contents. As, where the master signed a bill of lading, bearing the goods to be shipped on board a vessel, on an individual's account and risk, unto shipper's orders or his assigns, he or they paying freight for the said goods *being paid in Bengal*; but the freight, in fact, was not paid in Bengal, but the individual on whose account and risk the goods had been shipped, endorsed the bill of lading for value; and it was held that, as against the endorsee, the master could not claim freight on the vessel's arrival in this country, he having acknowledged, in

³ Craven v. Ryder, 1816. 6 Taunt. 433:

⁴ Bates v. Todd. 1 M. R. 106.

the bill of lading, the freight to have been paid before the vessel's departure from India.⁵

When the quantity or quality of the goods shipped are unknown to you, as in nine instances out of ten will be the case, further than as you are informed by the shipper, you must take care, in signing the bills of lading, to write below your name, the words "quantity and quality unknown." If the goods are in casks or bales, the contents of which must necessarily be unknown to you, you should, in like manner, write under your name, the words "contents unknown;" and, should the goods be of a perishable nature, as fruit, cheese, &c., then you should write, "not liable for corruption." By using these precautions you will save yourself from all dispute as to the precise quantity to be delivered,—as to the state of the goods,—or as to the contents of packages.

You will observe that the bill of lading contains a clause saving you from responsibility for damage arising from "the act of God, the king's enemies, all and every other dangers and accidents of the seas and navigation, of whatever nature or kind." I will consider, in a future letter, what falls under these exceptions; and here I may only observe, that the *act of God* comprehends all accidents arising from natural causes, as tempests, lightning, or earthquakes, in which the agency of man has no part, and that "all and every other dangers and accidents of the seas," &c., comprehend all accidents which arise from the seas and winds, and which could not be prevented by the care, skill, or foresight of the master or mariners.

I am, &c.

⁵ Howard v. Tucker, 14th Jan., 1831. 1 B. Ad., 712.

LETTER IV.

Clearance at the custom-house—no goods can be entered outwards until due entry be made outwards of ship and goods—no stores can be shipped but what are on the victualling bill—must produce certificate of clearance inwards for last voyage—and an account of the entry of the ship outwards for her intended voyage—duties of persons exporting goods—victualling bill—master must deliver a content—and make declaration—master's authority for departing—when there are passengers on board—when vessel to depart in ballast—officers of customs can go aboard after clearance outwards—vessel must bring to at stations within port—goods can be laden only at certain times—coasting trade—what it is—goods to be carried by coasting vessels—before lading or unlading goods—master must give notice in writing—what this notice in writing must state—trading with Ireland—general surffiance for lading—account written and signed by master must be delivered—particulars of cargo-book—before unlading master must produce transire—coast-waiter, &c., can go on board to examine times of shipping or unshipping—payment of dues—seaworthiness of vessel at sailing—as to hull—if incapable of performing voyage—as to tackling, rigging, and sails—practice of deferring caulking and overhauling until vessel at sea—as to master of competent skill—as to crew—although vessel apparently seaworthy at time of sailing, yet if she shortly become otherwise is against—copies of charter-party and policies must be on board, and also the newest charts—vessels ought also to be furnished with chronometer, marine barometer, or sympiesometer—utility of barometer.

GENTLEMEN,

Although you may have thus engaged the seamen, loaded the cargo, and be all ready for sea,—yet you are aware that the vessel cannot depart from port until she has been duly cleared outwards for the intended voyage under the penalty of £100,¹ and until the necessary port dues and other charges are paid. The clearance of the ship is regulated by statute, the requisites of which I will now detail.

¹ 8 and 9 V., c. 86, § 67.

No goods can be shipped, or waterborne to be shipped, on board any ship, in any port or place in the United Kingdom, or the Isle of Man, to be carried to parts beyond seas, before due entry outwards of the ship and of the goods has been made, and cocket granted, nor before the goods have been duly cleared for shipment, as will be afterwards mentioned; and no stores can be shipped for the use of a ship bound to parts beyond seas, nor any goods be deemed or taken to be such stores, except such as are borne upon the victualling bill duly granted for the ship; and no goods can be so shipped, or waterborne to be shipped, except at such times and places, and in such manner, and by such persons, and under the care of such officers, as the statute directs; and all goods and stores shipped, or waterborne to be so shipped, contrary to the statute are to be forfeited.²

Before any goods are to be taken on board a ship to be exported as aforesaid, the master must deliver to the collector or controller a certificate from the proper officer of the clearance inwards or coastwise of the ship, of her last voyage, specifying what goods, if any, have been reported inwards for importation; and he must also deliver to the collector or controller an account, signed by himself or his agent, of the entry outwards of the ship for the intended voyage, setting forth—the name and tonnage of the ship,—the name and place to which she belongs, if a British ship, or of the country, if a foreign ship,—the name of the master,—and the name of the place or places for which she is bound, if any goods are to be shipped for these places,—and the name of the place in such port at which she is to take her lading for that voyage; and if the ship has commenced her lading at some other port, the master must state the name of any port at which any goods have been laden, and produce a certificate from the searcher that the cockets for these goods have been delivered to him. The particulars of this account must be written and arranged in such form and manner as the collector and controller may require, and is the entry outwards of the ship, and

² 8 and 9 V., c. 86, § 66.

must be entered in a book to be kept by the collector, for the information of all parties interested. If any goods are taken on board the ship before she has been entered outwards, the master forfeits £100; but, where it becomes necessary to load any heavy goods on board before the whole of the inward cargo is discharged, the collector and controller can issue a suffering order for that purpose previous to entry.³

The person entering outward goods, to be exported to parts beyond seas, from any port in the United Kingdom or Isle of Man, must deliver to the collector or controller a bill of the entry thereof, fairly written, or fairly written and fairly printed, expressing in words at length the name of the ship and of the master,—of the place to which the goods are to be exported,—of the person in whose name the goods are to be entered,—and the quantities and proper denominations or descriptions of the several sorts of goods; and he must pay down any duties due upon the exportation of such goods. He must also deliver, at the same time, one or more duplicates of that bill, in which all sums and numbers may be expressed in figures; and the particulars to be contained in the bill must be written and arranged in such form and manner, and the number of duplicates must be such, as the collector and controller require; and thereupon the collector and controller cause a cocket to be written for such goods, making it known that such goods have been so entered, which cocket is to be signed by the collector and controller, and is delivered to the person who makes the entry, and who is to keep and be responsible for the proper use of it.⁴

Before any part of the goods for which any cocket has been granted can be shipped, or waterborne to be shipped, the same must be duly cleared for the shipment with the searcher; the particulars of the goods for each clearance must be endorsed on the cocket, with the number, denomination, or description of the respective packages containing the same; and, in the margin of each such endorsement, must be delineated the respective marks and numbers of such packages; and to each en-

at the port of loading, it would be very doubtful how far the vessel can be considered seaworthy at the time of sailing; and, at all events, if, in consequence of a deficiency either of water or stores at sailing, you are obliged to go into a port for a supply, there is little doubt this would be held a deviation, and, in case of any accident, would render the insurance null.

Before any ship can be cleared outwards at any port in the United Kingdom, or Isle of Man, for parts beyond the seas, with any goods shipped on board at that port, the master must deliver a content of the ship to the searcher, setting forth,—the name and tonnage of the ship,—the place or places of her destination,—the name of the master,—an account of the goods shipped on board,—and of the packages containing these goods, and of the numbers and marks upon these packages,—and a like account of the goods on board, if any, which have been reported inwards for exportation in that ship, so far as any of these particulars can be known by him. Before the clearance, also, the cockets, with the endorsements and clearances thereon, for the goods shipped, must be finally delivered by the respective shippers of the goods, to the searcher, who files these together, and attaches, with a seal, a label to the file, showing the number of cockets contained in that file; and he compares the particulars of the goods in the cockets with the particulars of the goods in the content, and attests the correctness thereof by his signature on the label and on the content. The master must also make and sign a declaration, before the collector and controller, to the truth of the content, and answer to either of them such questions concerning the ship, cargo, and intended voyage, as may be demanded of him. Thereupon the collector or controller clears the ship for her intended voyage, and notifies the clearance, and its date, upon the label to the file of cockets, and upon the victualling bill, and also in the book of ship's entries outwards, for the information of all parties interested, and transmits the content, the cocket, and the victualling bill to the searcher, and the particulars contained in the content must be written and arranged in

ballast, and ~~notifies the~~ clearance and its date upon the victualling bill, and also in the book of ship's entries outwards, for the information of all interested, and the victualling bill must be kept by the master as the clearance of the same;² and, if there are on board any goods of the inward cargo, which were reported for exportation in the same, the master must, before clearance outwards, deliver to the searcher a copy of the report inwards of the goods certified by the collector and controller; and that copy being found to correspond with the goods so remaining on board, is the authority to the searcher to pass the ship with these goods on board, and, being signed by the searcher, and filed with the cockets, is the clearance of the ship for those goods.³

The officers of the customs can go on board any ship after clearance outwards, within the limits of any port in the United Kingdom, or Isle of Man, or within four leagues of the coast, and demand the file of cockets, and the victualling bill; and, if there be any goods or stores on board, not contained in the endorsements on the cockets, nor in the victualling bill, such goods or stores are forfeited; and if any goods contained in the endorsements are not on board, the master forfeits £20 for every package or parcel of goods in the endorsements, and not on board; and if any cocket be at any time falsified, the person who falsified, or who has wilfully used the same, forfeits £100.⁴

Every ship departing from any port in the United Kingdom, or Isle of Man, must bring to at such stations within the ports as shall be appointed by the commissioners of customs, for the landing of officers from such ships, or for further examination previous to departure.⁵ And no goods can be put off, from any wharf, quay, or other place, or can be waterborne, in order to be exported, but only on days not being Sundays or holidays, and in the day-time;—from the 1st September until the 31st March, between sun-rising and sun-setting; and from 31st March to 1st September, between the hours of seven o'clock in the morning and

No goods can be carried in any coasting ship, except such as are laden to be so carried at some port or place in the United Kingdom, or at some port or place in the Isle of Man, respectively; and no goods can be laden on board any ship, to be carried coastwise, until all goods brought in that ship from parts beyond seas have been unladen. If any goods have been taken into, or put out of, any coasting ship at sea, or over the sea,—or if any coasting ship touch at any place over the sea,—or deviate from her voyage, unless forced by unavoidable circumstances,—or if the master of any coasting ship which has touched at any place over the sea, do not declare the same in writing, under his hand, to the collector or controller at the port in the United Kingdom, or Isle of Man, where the ship afterwards first arrives, the master forfeits £200.⁹

No goods can be laden on board any ship in any port or place in the United Kingdom, or Isle of Man, to be carried coastwise, in any such port or place, from any ship, until due notice in writing, signed by the master, has been given to the collector or controller, by the master, owner, wharfinger, or agent of the ship, of the intention to lade goods on board the same to be so carried, and until proper documents have been granted, as will be after noticed, for the lading or unlading of the goods. These goods cannot be laden except at the times and places, in the manner, by the persons, and under the care of the officers after mentioned; and any goods laden to be so carried, contrary to the statute, are to be forfeited.¹

The notice in writing, referred to in the above section, must state the name and tonnage of the ship,—the name of the port to which she belongs,—the name of the master,—the name of the port to which she is bound,—and the name or description of the wharf or place at which her lading is to be taken in; and this notice must be signed by the master, owner, wharfinger, or agent of the ship, and is entered in a book to be kept by the collector, for the information of all parties interested. In every notice for the lading of the ship, there must be

9 § 115. 1 § 116.

dorsement must be subjoined, in words at length, an account of the total quantity of each sort of goods intended in such endorsement, and the total number of each sort of package in which said goods are contained,—distinguishing such goods, if any, as are to be cleared for any bounty or drawback of excise or customs;—and also such goods, if any, as are subject to any duty on exportation, or entitled to any exemption from duty;—and also such goods, if any, as can only be exported by virtue of some particular order or authority, or under some particular restriction or condition, or for some particular purpose or destination; and all goods shipped, or waterborne to be shipped, not being duly cleared, are to be forfeited.⁵

The person clearing out the goods for shipment must, on each occasion, produce the cocket so endorsed to the searcher, and must also deliver a shipping bill, or copy of the endorsement, referring by names and date to the cocket upon which the endorsement is made, and must obtain the order of the searcher for the shipment of the goods; and the particulars contained in such endorsement and shipping bill must be written and arranged in such form and manner as the collector and controller require.⁶

The master of any ship about to depart from any port in the United Kingdom, or in the Isle of Man, for parts beyond seas, can, upon due application made by him, receive from the searcher a victualling bill for the shipment of such stores as he requires, and as shall be allowed by the collector and controller, for the use of the ship, according to the voyage upon which she is about to depart; and no article taken on board the ship is deemed to be stores except such as are borne upon the victualling bill.⁷

The statute fixes no precise amount of stores which must be taken on board for any particular voyage; but it is an especial duty of you, as master, to take on board a sufficient and adequate supply of stores and of water, calculated for the longest extent of the voyage. If there should be an inadequate supply of either taken on board,

at the port of loading, it would be very doubtful how far the vessel can be considered seaworthy at the time of sailing; and, at all events, if, in consequence of a deficiency either of water or stores at sailing, you are obliged to go into a port for a supply, there is little doubt this would be held a deviation, and, in case of any accident, would render the insurance null.

Before any ship can be cleared outwards at any port in the United Kingdom, or Isle of Man, for parts beyond the seas, with any goods shipped on board at that port, the master must deliver a content of the ship to the searcher, setting forth,—the name and tonnage of the ship,—the place or places of her destination,—the name of the master,—an account of the goods shipped on board,—and of the packages containing these goods, and of the numbers and marks upon these packages,—and a like account of the goods on board, if any, which have been reported inwards for exportation in that ship, so far as any of these particulars can be known by him. Before the clearance, also, the cockets, with the endorsements and clearances thereon, for the goods shipped, must be finally delivered by the respective shippers of the goods, to the searcher, who files these together, and attaches, with a seal, a label to the file, showing the number of cockets contained in that file; and he compares the particulars of the goods in the cockets with the particulars of the goods in the content, and attests the correctness thereof by his signature on the label and on the content. The master must also make and sign a declaration, before the collector and controller, to the truth of the content, and answer to either of them such questions concerning the ship, cargo, and intended voyage, as may be demanded of him. Thereupon the collector or controller clears the ship for her intended voyage, and notifies the clearance, and its date, upon the label to the file of cockets, and upon the victualling bill, and also in the book of ship's entries outwards, for the information of all parties interested, and transmits the content, the cocket, and the victualling bill to the searcher, and the particulars contained in the content must be written and arranged in

such form and manner as the collector and controller require.⁸

The file of cockets and the victualling bill must be delivered by the searcher to the master of the ship, at such station within the port, and in such manner as the commissioners of customs may appoint for that purpose; and that file of cockets and victualling bill so delivered must be kept by the master, as the authority for departing from the port, with the several parcels and packages of goods and stores on board, so far as they agree with the particulars of the endorsements on the cockets, or with the victualling bill.⁹

If any passengers are to depart in any ship from the United Kingdom, or Isle of Man, for parts beyond seas, the master can pass an entry, and receive a cocket in his own name, for the necessary personal baggage of all such passengers, and can duly clear the baggage for shipment on their behalf, stating, in the clearances, the particulars of the packages, and the names of the respective passengers. If the ship is to take no other goods than the necessary personal baggage of the passengers actually going the voyage, the master can enter the ship outwards in ballast, for passengers only; and if no other goods than this baggage, duly entered and cleared, be taken on board, the ship is to be deemed a ship in ballast, notwithstanding such baggage, and it is described in the clearance,—on the content,—on the label to the cocket or cockets,—on the victualling bill,—and in the book of ship's entries, as a ship cleared in ballast, except as to the necessary personal baggage of passengers going the voyage.¹

If the ship is to depart in ballast from the United Kingdom, or Isle of Man, for parts beyond seas, having no goods on board, except the stores of the ship, borne upon the victualling bill, or any goods which have been reported inwards for exportation in the same ship, the master must, before her departure, answer such questions to the collector or controller, touching her departure and destination, as may be demanded of him; and, thereupon, the collector or controller clears the ship in

ballast, and ~~notifies the clearance~~ and its date upon the victualling bill, and also in the book of ship's entries outwards, for the information of all interested, and the victualling bill must be kept by the master as the clearance of the same;² and, if there are on board any goods of the inward cargo, which were reported for exportation in the same, the master must, before clearance outwards, deliver to the searcher a copy of the report inwards of the goods certified by the collector and controller; and that copy being found to correspond with the goods so remaining on board, is the authority to the searcher to pass the ship with these goods on board, and, being signed by the searcher, and filed with the cockets, is the clearance of the ship for those goods.³

The officers of the customs can go on board any ship after clearance outwards, within the limits of any port in the United Kingdom, or Isle of Man, or within four leagues of the coast, and demand the file of cockets, and the victualling bill; and, if there be any goods or stores on board, not contained in the endorsements on the cockets, nor in the victualling bill, such goods or stores are forfeited; and if any goods contained in the endorsements are not on board, the master forfeits £20 for every package or parcel of goods in the endorsements, and not on board; and if any cocket be at any time falsified, the person who falsified, or who has wilfully used the same, forfeits £100.⁴

Every ship departing from any port in the United Kingdom, or Isle of Man, must bring to at such stations within the ports as shall be appointed by the commissioners of customs, for the landing of officers from such ships, or for further examination previous to departure.⁵ And no goods can be put off, from any wharf, quay, or other place, or can be waterborne, in order to be exported, but only on days not being Sundays or holidays, and in the day-time;—from the 1st September until the 31st March, between sun-rising and sun-setting; and from 31st March to 1st September, between the hours of seven o'clock in the morning and

2 § 88. 3 § 90. 4 § 93. 5 § 94.

four in the afternoon ; nor can any goods then be put off, or waterborne, for exportation, unless in the presence or with the authority of the proper officer of customs, nor except from a legal quay, appointed by her Majesty, or at some wharf, quay, or place appointed by the commissioners of customs for the shipping of such goods by sufferance.⁶

Having thus given you the custom-house regulations for the shipping of goods for exportation, and the clearances of vessels for parts beyond the seas, I now proceed to the shipping of goods to be carried coastwise, and to the clearance of vessels trading coastwise.

All trade by sea, from any part of the United Kingdom to any other part thereof, or to the Isle of Man, or from one part of the Isle of Man to any part of the United Kingdom, or from one part of the Isle of Man to another part thereof, is deemed to be a coasting trade, and all ships, while employed therein, are to be deemed to be coasting ships ; and no part of the United Kingdom, or of the Isle of Man, however situated with regard to any other part, is to be deemed, in law, with reference to each other, to be parts beyond seas, in any matter relating to the trade, or navigation, or revenue of the realm.⁷ But all goods liable to duty of customs upon the importation, or bringing of them into the Isle of Man, when brought from the United Kingdom into that island, and all vessels bringing the same, are liable to the same rules and regulations as are required by law, in respect of goods imported into that island from foreign parts, and in respect of the vessels bringing the same ; and all penalties and forfeitures inflicted by law for any breach of the said rules and regulations, attach upon all goods so brought into that island, contrary to the rules and regulations, or any of them, and upon all persons committing any breach thereof. The commissioners of the treasury can determine and direct, in what cases the trade by water, from any place on the coast of the United Kingdom to another of the same, shall or shall not be deemed a trade by sea, within the meaning of the act, or of any act relating to the customs.⁸

No goods can be carried in any coasting ship, except such as are laden to be so carried at some port or place in the United Kingdom, or at some port or place in the Isle of Man, respectively; and no goods can be laden on board any ship, to be carried coastwise, until all goods brought in that ship from parts beyond seas have been unladen. If any goods have been taken into, or put out of, any coasting ship at sea, or over the sea,—or if any coasting ship touch at any place over the sea,—or deviate from her voyage, unless forced by unavoidable circumstances,—or if the master of any coasting ship which has touched at any place over the sea, do not declare the same in writing, under his hand, to the collector or controller at the port in the United Kingdom, or Isle of Man, where the ship afterwards first arrives, the master forfeits £200.⁹

No goods can be laden on board any ship in any port or place in the United Kingdom, or Isle of Man, to be carried coastwise, in any such port or place, from any ship, until due notice in writing, signed by the master, has been given to the collector or controller, by the master, owner, wharfinger, or agent of the ship, of the intention to lade goods on board the same to be so carried, and until proper documents have been granted, as will be after noticed, for the lading or unlading of the goods. These goods cannot be laden except at the times and places, in the manner, by the persons, and under the care of the officers after mentioned; and any goods laden to be so carried, contrary to the statute, are to be forfeited.¹

The notice in writing, referred to in the above section, must state the name and tonnage of the ship,—the name of the port to which she belongs,—the name of the master,—the name of the port to which she is bound,—and the name or description of the wharf or place at which her lading is to be taken in; and this notice must be signed by the master, owner, wharfinger, or agent of the ship, and is entered in a book to be kept by the collector, for the information of all parties interested. In every notice for the lading of the ship, there must be

⁹ § 115. ¹ § 116.

stated the last voyage on which she arrived at that port; and, if that voyage has been from parts beyond seas, there must be produced with the notice, a certificate from the proper officer, of the discharge of all goods, if any, brought in the ship, and of the due clearance of the ship inwards of that voyage.²

Upon the arrival of any coasting ship at any port in Great Britain from Ireland, or, in Ireland, from Great Britain, the master must, within twenty-four hours after arrival, attend and deliver the notice already mentioned, duly signed by him, to the collector or controller. If the vessel have on board any goods subject, on arrival, to any duty of excise, or any goods imported from parts beyond the seas, the particulars of these goods, with the marks and numbers of the packages containing them, must be set forth in the notice; and if there be no such goods on board, then it must be declared in the notice that no such goods are on board; and the master must answer any questions relating to the voyage that may be demanded of him by the collector or controller. A master failing, in due time, to deliver this notice, and truly to answer these questions, forfeits £100.³

When due notice has been given to the collector or controller at the port of lading, of the intention to lade goods on board a coasting ship, the collector or controller grants a general sufferance for the lading of goods, without specifying the same, at the wharf or place expressed in the sufferance; and that sufferance is a sufficient authority for lading any sort of goods, except such (if any) as may be expressly excepted therein. But, before any sufferance can be granted for any goods prohibited to be exported, the master or owner, or the shipper of the goods, must give bond, with one sufficient security, in treble the value of the goods, that the same shall be landed at the port for which the sufferance is required, or shall be otherwise accounted for to the satisfaction of the commissioners of customs.⁴

Before a coasting ship can depart from the port of lading, an account, together with a duplicate thereof, all fairly written and signed by the master, must be deli-

vered to the collector or controller, and in that account must be set forth the particulars required to be entered in the cargo-book, after mentioned, of all foreign goods, and of all corn, grain, meal, flour, or malt, laden on board, and, generally, whether any or no other British goods are laden on board, or whether the ship is laden with British goods, not being of any of the descriptions mentioned in the act; and the collector or controller selects or retains one of these accounts, and returns the other, dated and signed by him, and noting the clearance of the ship thereon, and that account is the clearance of the ship for the voyage, and the transire for the goods expressed therein. If the account is false, or does not correspond with the cargo-book, the master forfeits £50.⁵

The cargo-book must be kept by the master of each coasting vessel, and in it must be stated,—the name of the ship,—of the master,—of the port to which she belongs,—and of the port to which bound on each voyage. In this book must be entered, at the port of lading, an account of all goods taken on board, stating the description of the packages,—the quantities and description of the goods,—the quantities and descriptions of any goods stowed loose,—and the names of the respective shippers and consignees, as far as any of these particulars are known to him. The master must produce the book for the inspection of the coast-waiter, or other proper officer, so often as the same is demanded, and who is at liberty to make any note or remark therein; and if the master fails correctly to keep the cargo-book, or to produce the same, or if at any time there be found on board the ship any goods not entered in the cargo-book as laden, or if at any time it be found that any goods entered as laden be not on board, the master forfeits £50. If, upon examination at the port of lading, any package entered in the cargo-book as containing any foreign goods is found not to contain these goods, the package and the contents are to be forfeited.⁶

In the cases after mentioned, the collector and controller can grant for any coasting ship a general transire,

to continue in force for any period not exceeding one year from its date, for the lading of any goods, (except such goods, if any, as may be expressly excepted therein,) and for the clearance of the ship in which such goods are laden, and for the unloading of the goods at the place of discharge, viz. :—

For any ship regularly trading between places in the river Severn, eastward of the Holmes.

For any ship regularly trading between places on the Humber.

For any ship regularly trading between places in the Frith of Forth.

For any ship regularly trading between places to be named in the transire, and carrying only manure, lime, chalk, stones, gravel, sand, or any earth, not being fuller's earth.

And, whenever it appears necessary to the commissioners of customs, they can grant general transires, under such regulations, and for such time as they may see fit, for lading any goods, and for clearing the ship in which the goods are laden, and for unloading the goods at the place of discharge ; but such transire must be written in the cargo-book required to be kept by the masters of coasting vessels. And if the commissioners, or collector and controller, at any time, revoke such transires, and notice thereof be given to the master or owner of the ship, or to any of the crew when on board the ship, or be entered in the cargo-book by any officer of the customs, such transires become void, and must be delivered up by the master or owner to the collector or controller, or to any other officer of the customs demanding the same.⁷

The coast-waiter, the land-waiter, the searcher, and any other proper officer of the customs, can, in any case, and at all legal times, go on board a coasting ship, in any port or place in the United Kingdom, or Isle of Man, or at any period of her voyage, and strictly search the ship, examine all the goods laden on board, and demand all documents which ought to be on board the ship.⁸

No goods can be shipped, or waterborne to be shipped, to be carried coastwise, in the United Kingdom, or Isle of Man, but only on days not being Sundays or holidays, and in the daytime, viz., from the 1st September until the last day of March, between sun-rising and sun-setting, and from the last day of March to the 1st September, between the hours of seven o'clock in morning and four o'clock in the afternoon; and no goods can be shipped or waterborne unless in the presence or with the authority of the proper officer of the customs, or unless at places to be appointed or approved by that officer.⁹

I have been thus full as to these custom-house regulations, in order to put it in your own power to perform what is required of you, without the intervention of an agent, or of any other person; and, having complied with all the regulations, and obtained the clearance of your vessel, you must also, before sailing, be punctual in paying the harbour and light-dues, and all other dues for the vessel, because, as I will have occasion afterwards to notice, the neglect of this may amount to barratry on your part. But there is another thing which, before sailing, demands your most particular attention, both in regard to the shippers of goods and to the insurers; and that is, the seaworthiness of the vessel.

By the charter-party it is expressly agreed, and in every contract of insurance it is always understood, that the vessel must be tight, staunch, and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage; and although, in the charter-party, the construction is not so strict, provided the contract for the carriage of the goods be substantially performed, and any loss or damage to the goods, arising from leakage, or the unseaworthiness of the ship, may be made up to the shipper by the loss of the freight, or in damages, yet, in insurance, the policy becomes absolutely void, if there be any part of the ship unseaworthy at the time of sailing; nor will the ignorance of you or your owners be the least excuse for any defect or disrepair in any part of the vessel,

because you are bound, at all events, to have the vessel strictly in terms of your contract, and in a state sufficient to carry the goods under that contract against all events other than the acts of God and of the Queen's enemies. Nor will any survey of the vessel, made previous to, or at the time of sailing, however regular and formal it may have been, have the effect of relieving you of this obligation, or of establishing the complete seaworthiness of the vessel, although, such a survey may have the effect of raising the *presumption*, that the vessel was seaworthy at the time of sailing, and of obliging the shipper, who alleges damage from the state of the ship, or the insurer, who alleges unseaworthiness, to prove that she was not seaworthy. Nothing, however, will excuse you for not carefully and minutely examining both the interior and exterior of the whole vessel, before sailing; and even then, a hidden defect may exist which may damage the cargo, or make the insurance void, and your ignorance of that hidden defect will be no excuse; and although the vessel be perfect in herself, as a vessel, yet, if, owing to her construction, or from any other cause, she be incapable of performing the voyage for which she is engaged, she cannot be held to be seaworthy. Thus, a vessel insured had been lengthened from 80 to 113 tons burthen, but the new parts had not been fastened with knees, as was usual and proper for vessels of such a burthen; she was freighted for a foreign voyage, but sailed heavily, and was at last lost; and, in an action on the policy of insurance, the underwriters were held to be discharged, on the ground of the vessel not being seaworthy.¹

It is not merely to the hull of the vessel, however, that your examination must be directed; you must also take care that the vessel is properly found in tackling, rigging, and sails. I will give you two instances, the first of which applies to the ground tackling, and the second to the sails. The ship insured was riding at anchor in Leith roads, with her best bower anchor, and, having driven in a breeze, the master dropped the small bower anchor, but the cable broke; for the purpose of

¹ Watt v. Morris, 10 May, 1813. 1 Dow. 32.

running into Leith harbour, the master cut the cable, but the vessel took the ground near the beacon; and, in an action against the underwriters it was proved that the cables were rubbed and injured, and too light and short, and the House of Lords held that the warranty of seaworthiness had not been complied with, and that, therefore, the underwriters were discharged.² In another case, the vessel insured was sufficient and seaworthy in the hull, and the sails to be used in stormy weather were in good condition, but the main-top-gallant sails and studding sails, which are serviceable in light breezes, were rotten, and almost unserviceable; and it was held that the risk being thereby greatly increased, the policy of insurance had never attached, and therefore an action against the underwriters could not be supported.³

I am afraid it is too common a practice among ship-masters, with a view no doubt of saving expenses and time in harbour, to postpone the caulking of the upper parts of the vessel, and the overhauling and repairing of the tackling and rigging, until the vessel be fairly out at sea, when these can be done by the crew: but this is a dangerous practice, and ought not to be followed, because you ought to be fully aware that if, at the commencement of the voyage, the vessel is not sufficiently tight and staunch, and fully provided with all proper tackling and apparelling necessary for the voyage she is about to undertake, not only will the insurance be void, but you will be liable to the shippers for any loss or damage they may sustain through this deficiency.

Another essential in the seaworthiness of the vessel is, that the master must be a person of competent skill. On this I need not here enlarge; but I will just show you, in one case, the consequences of the master's ignorance. A vessel was insured to her loading port or ports on the coast of Spain, within the Straits of Gibraltar, *including Tarragona, and not higher up the Mediterranean*: Tarragona was at that time in possession of the Spanish, who were allies to this country, but Barcelona, lying further up the Mediterranean, was then in

² *Wilkie v. Geddes*, 27th Feb., 1815. 3 Dow. 57.

³ *Wedderburn v. Bell*, 1807. 1 Camp.

possession of the French. The master was entirely ignorant of the coast, and although it was his intention to go into Tarragona, yet he passed that port in the night, and, mistaking Barcelona for Tarragona, he was entering the former port, when he was captured by the French. It was held that, by sending out a master who was totally ignorant of the one port and the other, the implied warranty of seaworthiness was not complied with, and therefore the insured could not recover.⁴ To this qualification of the master, I may add that, if the voyage is to be of any length, there must be an officer on board capable of supplying the master's place, in case of illness or indisposition, and that if there be no such officer, the vessel is not seaworthy, and the underwriters will be discharged.⁵

I need scarcely add, that it is an equally important essential of seaworthiness, that, at sailing, the vessel be manned with a crew competent for the voyage. I have already remarked that, at a port in this country, there will be little difficulty in engaging such a crew; but the difficulty may occur at a port abroad; and I will give one instance of the difficulty in which a master may be placed in this respect. A vessel was insured from Cuba to Liverpool, and her complement was ten men; at Cuba the master was unable to engage ten men for the whole voyage, but he engaged eight men for Liverpool and two for Jamaica; the vessel sailed, and proceeded to Jamaica, where she landed the two men, and procured other two, and was afterwards lost; but, in an action against the underwriters, it was held that if eight men were sufficient for the voyage, the touching at Jamaica was a deviation; and if eight were not sufficient, that then the voyage had no proper commencement, as the vessel was not seaworthy when she sailed.⁶

It is, no doubt, sufficient if the vessel be seaworthy at the time of sailing, although she become otherwise in an hour thereafter; but, if she become unable to perform the voyage in a short time after sailing, without

⁴ *Tait v. Levi*, 11th November, 1811. 14 East. 481.

⁵ *Clifford v. Hunter*, 1827. 1 M. M. 108.

⁶ *Forshaw v. Chabert*, 27th Nov., 1821. 3 B. B. 155.

some visible or adequate cause to produce this effect, as the starting of a plank, or other accident, the presumption is, that this inability arose from causes which existed previous to her sailing, and that, at the time of sailing, she was not seaworthy.⁷

Before you sail, it will be proper, and indeed quite requisite, that your owners furnish you, not only with copies of the charter-parties, where any have been entered into for the conveyance of the goods, but also with copies of the policies of insurance which have been effected both on the ship and goods. A prudent owner ought never to allow his master to sail without these, so as he may be fully aware of the terms upon which these have been effected, and conduct the voyage accordingly. Equally essential is it that you have a supply of all the newest charts for the voyage; and now-a-days a vessel is hardly deemed seaworthy, at least for a long voyage, unless she is provided with a well-regulated chronometer, a marine barometer, or a sympiesometer. I know that there are some lurking prejudices against the utility of these instruments, although I understand that the marine barometer is now generally preferred, for some voyages, to the sympiesometer; but these prejudices arise from ignorance, and must vanish with increased knowledge and experience. I will just give you one instance of the great utility and benefit of the marine barometer, derived from the personal experience of an established author, who himself was one the crew, and with it I will conclude this long letter.—“I was in a southern latitude. The sun had just set with placid appearance, closing a beautiful afternoon; and the usual mirth of the evening watch was proceeding, when the captain's order came, to prepare with all haste for a storm. The barometer had begun to fall with appalling rapidity,—as yet, the oldest sailors had not perceived a threatening sky, and were surprised at the hurry and extent of the preparations; but the required measures were not completed, when a more awful hurricane burst upon them than the most experienced had ever braved.” And the author adds, “in that awful night, but for the little tube of mercury

⁷ *Watson v. Clarke*, 12th May, 1813. 1 Dow. 336.

which had given the warning, neither the strength of the noble ship, nor the skill and energies of the commander, could have saved one man to tell the tale."⁸

This may establish your confidence in the marine barometer, or sympiesometer, and cause you to pay strict attention to the indications exhibited by either of these instruments during a voyage, and take the necessary precautions accordingly.

I am, &c.

⁸ 1 Arnot's Physics, 350.

LETTER V.

Embargo—what it is—does not render contract null—only temporary restraint on performance—when removed, performance must be made—exception—seamen's wages during embargo—sailing—when to sail—conditions in policy to sail or depart on or *before* a certain day—examples—not to sail *after* a certain day—instances of what is a sailing under this warranty—it must be strictly complied with—examples as to—taking a pilot—master or mate certified under statute—general rule as to employment of pilots—Trinity House of Deptford Stroud—limits of Trinity House pilots—local pilots—lists of must be sent to Trinity House—particular description of pilot in license—must write his christian and surname in the log—and master must insert it in report of vessel inwards—penalty on master continuing unlicensed person after offer by pilot—but offer to take charge must be made to master—and license produced—licensed pilot supersedes unlicensed person—exceptions—pilot refusing, &c., to go off—quitting vessel—using boats, &c., unnecessarily—lending license, &c.—rules as to London docks—master reporting false draught of water—responsibility of masters and owners—exceptions—judicial remarks on foregoing sections—certain vessels exempted from employing pilots—tables of pilotage—pilots in Scotland—Trinity House pilots—appointment and qualifications—exclusive rights of Trinity House—lists of pilots—license must be registered—licensed pilot supersedes unlicensed person—penalty—bye-laws of corporation—pilot refusing to take charge, &c.—conducting into danger, &c.—employing boat, &c., unnecessarily—must not be taken to sea—payment and recovery of pilotage—responsibility of masters and owners—riding by buoys, &c.—carrying her majesty's colours—striking sail.

GENTLEMEN,

You may have thus cleared your vessel at the custom-house, and she may be in all respects seaworthy and fit for the intended voyage, yet there may be an obstacle to your sailing on that voyage, by commerce with the country to which she is destined being prohibited, or by an embargo being laid on in the port of lading; although, in all likelihood, an embargo will at the present day be a matter of seldom occurrence. But it is

necessary you should be made aware of the effects, both of a prohibition of commerce, and of an embargo; and this seems the proper place for imparting such knowledge.

If, before the commencement of the voyage, commerce be prohibited between the country to which the ship or cargo belongs, and the country to which they are destined, or should war or hostilities break out between these countries, the contract for the conveyance is at an end; although this effect ought not to follow if the prohibitions had been made public, or war declared, *after* the vessel had departed on the voyage, and before its completion. Neither can the existence of hostilities, or the breaking out of war, between the country or place to which the ship or cargo belongs, and any other country to which these are not destined, have the effect of putting an end to the contract, although such an event may render the performance of it more hazardous and expensive.¹

But, as the laws of one nation do not give effect to the positive institutions of any other nation,—should the merchant hire the ship to go to a foreign port and take on board a cargo which he becomes bound to load there, but the exportation of the intended articles is prohibited by the government of that country,—and if a ship is hired to export a particular cargo, and the commodities which are to compose that cargo are prohibited, by the laws of the country to which the ship and cargo belong, to be exported,—it is reasonable to hold that the contract will be at an end on both sides, and that the owners will not be liable in damages to the merchant, nor the merchant to the shipowners.²

An embargo is the most frequent cause of detention which has occurred in the law of insurance, and that embargo is laid on by a proclamation or order of government, usually issued in time of war or pending hostilities, prohibiting the departure of ships or goods from the ports of either state, or to exclude them from the ports of this country;³ and an embargo in this country, when founded on a previous law, is equally binding as an act of parliament. But, in your situation of master, you

1 Abbot, 596. 2 Abbot, 597. 3 1 Mar. 511. 2 Arn. 814.

are not called upon to judge of the legality or illegality of an embargo laid on in any port: because, whether it be legal or illegal, the temporary detention of the ship or goods will have the same effect; and, under the policy of insurance, the underwriters are liable for the loss which may be occasioned by that detention. In so far as freighters or charterers are concerned, however, an embargo in the port of lading, or in any other port at which the vessel may necessarily touch in the course of her voyage, does not put an end to the charter-party or affreightment contract; but it may operate as a temporary restraint on the performance of it. And, therefore, when the embargo is removed, the previous existence of it will be no excuse for you not then performing your voyage; and if it be not so performed, you and your owners will be liable to the freighters in damages:⁴ but if the goods be such as will keep till the expiry of the embargo, and the voyage be then performed, the freight will, of course, be due. To this rule there is only one exception, and that is, when the embargo has been imposed by the merchant's country, *by way of reprisals and partial hostilities* against the country of the ship,—such as was the embargo imposed by the British government in 1801, on all Swedish vessels in the ports of this country, in consequence of which several cases arose. In one case, a Swedish vessel had been chartered to go from London to St. Michael's, for a cargo of fruit, and, having sailed on that voyage, was driven back to Ramsgate harbour, and there detained by the embargo, although, after the embargo was taken off, the master offered to proceed, but was prohibited by the merchant,—the fruit season having then passed: it was held that the master had no action of damages against the merchant for non-performance of the contract.⁵ And, in another case, a Swedish vessel had sailed from this country, with a British cargo of fish, and had proceeded a few days on her voyage, but, meeting bad weather, became leaky, and returned to Falmouth, where, after a few days, the embargo was imposed, and the cargo

⁴ Hadley v. Clerk. 8 T. R. 259.

⁵ Touteng v. Hubbard. 3 B. P. 291.

was unlivered and returned to the owners:—it was held that the merchant was not liable in freight.⁶

You will bear in mind, that sailing out of port in breach of an embargo is an act of barratry on your part;⁷ but, as in a question with underwriters, it does not matter whether the embargo was legal or illegal, the injury to the ship or goods by the detention being the same, the underwriters are liable for the loss thereby occasioned. You ought, therefore, immediately to put your owners and the shippers in possession of all the information you can obtain, as to the probable duration of the embargo, so as to enable them to make their election, whether they shall treat the detention as a total loss, and give notice accordingly of their intention to abandon to the underwriters.⁸ But you will observe that, although, at one time, it was rather a disputed point, whether, during the continuance of an embargo, the seamen were entitled to their wages, yet, under the present Merchant Seamen's act, no such question can occur,—as the causes of forfeiture are specially defined; and—as was held in the embargo cases which occurred in 1800,—the agreement with the mariners continues and is in force from the commencement of the articles, up to and at the period of the ship's arrival at her port of discharge, and the final termination of her voyage there.

But let us now proceed to the sailing of the vessel from her port of lading, and the commencement of the voyage, after she has been duly cleared at the custom-house, and is in every respect seaworthy. Under the old sea-laws the master was required, before he hoisted sail, to advise with the pilot, the mate, and the crew as to the sailing, and to follow the advice of the majority, where it was not plainly erroneous; but in this country, and at the present day, the master himself has the entire management of the ship and of her sailing, only he must take care not to sail in stormy or tempestuous weather, or in a dangerous gale, or in foggy weather.⁹ It is a common stipulation in charter-parties that the vessel

6 *Isabella Jacobina*, *Sovergreen*, 13th October, 1801. 4 Rob. 77.

7 *Robinson v. Ewer*. 1 T. R., 97. 8 2 Mar. 568. 2 Arn. 815.

9 *Abbot*, 351. *Girolamo Guirnovich*, 21st Nov. 1834. 3 Hag. 176.

shall sail with the first fair wind for the voyage, or the first fair wind for the port of destination; and, although where there is such a stipulation, any short delay in sailing from these causes will not affect the right to freight, yet it is your unquestionable duty to sail without any delay, as soon as the weather permits, so as to avoid any chance of dispute with the freighter.

But if there is a condition in the policy of insurance, that the vessel shall sail or depart, from the port or place, on or before a day certain, this is a different matter; and the vessel must actually break ground and sail upon the intended voyage by that day, otherwise the insurance will be void. It does not matter how short a distance she may proceed, or though she may be put back by stress of weather, or an embargo be laid on, provided the vessel has actually commenced sailing on the intended voyage, on the stipulated day.¹

It will be proper to give you an instance or two,—although it is necessary to mention that there is a distinction admitted between the expressions *to sail*, and *to depart* from the port by a certain day—the former being understood of the vessels getting under weigh on her voyage, although she may only proceed a short distance—but the latter requiring an actual departure from the port, or out of the port, at which the voyage is to commence.²

In one case, the vessel was insured at and from Surinam, and all or any of the West India Islands, except Jamaica, to London, and she was warranted to sail with convoy, on or before 1st August; having taken in her cargo at Surinam, she sailed from that island before the first, but on the 4th she arrived at Tortola, seeking convoy; she sailed from thence, and was lost on her homeward voyage;—but it was held that the warranty in the insurance had been fully complied with.³ In another case, the vessel was warranted to depart from Demerara on or before the 1st August; the goods insured were loaded, and the cargo completed in the river, and the vessel having been cleared at the custom-house, the mas-

1 1 Mar. 365. 2 Park, 669. 2 Park, 671, 683.

3 Wright v. Shiffner. 3 Camp. 247.

ter proceeded down, and about two miles out to sea, where the tide being low, the vessel anchored; on 3rd August the vessel crossed the shoal and stood out to sea, but soon after was lost by a peril of the sea;—it was held that this was a sailing within the meaning of the warranty.⁴ Nor will it be a compliance with a warranty to sail on or before a day certain, that the vessel was ready to sail by that day, and had proceeded for a short distance along her moorings,—or was prevented from sailing by stress of weather.⁵

But when the vessel is warranted *to depart* on or before a day certain, nothing short of an actual departure from port on that day will satisfy it. As, where a vessel was warranted to depart from the port of loading on or before the 15th of September,—the vessel had completed her loading, obtained her clearances, and sailed on the 9th; but, in consequence of the wind changing, she could not get out of harbour—was obliged to come to anchor—and was detained in the mouth of the harbour till after the 15th:—it was held that, though under a warranty to sail merely, this sailing would have been sufficient, yet that nothing less than an actual departure from port would satisfy a warranty *to depart*.⁶

The same principle applies where the warranty is that the vessel shall not sail *from* a certain port or *for* another port *after* a certain date, in which case, if the vessel sail *after* the date, the insurance is void. Thus, where freight was insured with an association in North Shields, subject to the rules and regulations of the club, one of which was that vessels should not sail from ports in England after the 1st of September, the time of clearing at the custom-house being deemed the time of sailing, *provided the ship was then in readiness for sea*: the vessel dropped down the river, from the port of Sligo, before the 1st of September, in readiness for sea, except that she had not her full cargo of ballast, there being a bar at the mouth of the river which the ship could not have crossed with the whole of the ballast on board; boats were, however, in

⁴ Lang v. Anderton, 24th November, 1824. 3 B. C. 342.

⁵ Wilson v. Tenterden, 1st March, 1829. 1 D. L. 218. Nelson v. Salvador, M. M. 309.

⁶ Moir v. Ro. Ex. Ass. Co., 25th January, 1815. 3 M. S. 461. 4 Camp. 84.

waiting on the outside on the 1st of September, to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in doing so; and to ascertain the damage, the master put into an adjoining port, without taking in the rest of his ballast, which was not done till the 4th, and on the 8th the vessel proceeded on her voyage:—it was held that the dropping down the river and crossing the bar, without full ballast, was not a *sailing*, and that until the ballast was completed she was not ready for sea, within the rule referred to in the policy.⁷

A question nearly similar occurred in the following case:—A ship was insured with a club, on a time policy, warranted not to “sail foreign” after the time restricted by the club-rules; these rules or warranties limited the time of sailing to different parts of the world, and by a distinct warranty it was declared that the time of clearing at the custom-house should be deemed the time of sailing, *provided the ship was then ready for sea*: the ship insured was bound for the Bay of Fundy, from Dublin, and the last day for sailing, by the rules, was the 1st of September; on the 31st of August she cleared out, and dropped down the Liffey on the 1st of September, with an incomplete crew, (though a full complement had been engaged before clearing,) to the Pigeon-hole, within the port, or harbour of Dublin, assisted by a boat’s crew; the whole of the crew came on board during that day, but in the afternoon and evening the wind was unfavourable for going to sea, though a little before midnight, when it was low water, it became fair; about half-past three o’clock of the morning of the 2nd she sailed from the Pigeon-hole, and proceeded on her voyage, and ultimately quitted the port of Dublin about half-past five o’clock on the same morning:—it was held that this was not a sailing in compliance with the warranty.⁸

But where a ship was warranted “not to sail for British North America after the 15th of August,” and on that day she was in the dock of Dublin, but all ready for sea, and having cleared for Quebec, was hauled out

⁷ *Pettigrew v. Pringle*, 4th May, 1832. 3 B. Ad. 514.

⁸ *Graham v. Barras*. 5 B. Ad. 1011.

of dock into the Liffey, as early in the afternoon as the tide permitted; in consequence of the wind she could not get up a sail, but was warped down the river about half a mile, when, the tide falling, she took the ground; next day she was warped a little farther, and again took the ground, about ten miles from the harbour's mouth; but on the 17th, the wind having changed, she set sail and got out to sea:—it was held that, as the vessel was in prosecution of her voyage on the 15th of August, having made a movement, though in the river, for the purpose of proceeding to the sea, and over the sea, to North America, the warranty had not been broken, and the insured were entitled to recover.⁹

Upon the same principle, where the warranty is to sail *after* a certain day, and *before* another day, this warranty must be equally strictly complied with;¹ and you can now understand that a sailing or departing under the warranty must be a sailing or departing with a competent crew, the necessary equipments and stores, and every thing requisite and in readiness for the voyage. The distinctions have been thus ably drawn:—"If a ship quits her moorings and removes, though only to a short distance, being perfectly ready to proceed on her voyage, and is by some subsequent occurrence detained, that is a sailing; but it is otherwise if, at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage."² And this distinction is well illustrated by the cases already referred to: for, in the case of *Pettigrew*, although the vessel had dropped down the river and crossed the bar before the fixed day, yet she was not then ready for sea, as she had not her full quantity of ballast on board in consequence of the bar, and the ballasting was not, in fact, finished until the 4th of September; and in *Graham's case*, though the vessel dropped down the river on the 1st of September to a place within the port of Dublin, yet her crew was incomplete, and the rest only came on board in the course of that day, but the wind being then unfavourable, she did not sail till the day following.

⁹ *Cockrane v. Fisher*. 5 Tyrwh., 496. 1 1 Mar. 359.

² Per Lord Tenterden in *Pettigrew*, *ut sup.*

While, in Cockrane's case, the vessel was all ready for sea on the day fixed,—was actually out of dock on that day,—and had begun to prosecute her voyage. The distinction is quite obvious between the mere act of sailing, not fit for sea, and your being then all prepared and ready for sea,—in which latter case only can such a sailing be held as a compliance with the warranty.

And, as a very prominent distinctive case in such a warranty, you may take the following:—A vessel was warranted to sail from Portneuf, on the St. Lawrence, on or before the 28th of October; the vessel sailed from that port on the 26th, and on the 28th arrived at Quebec, where all vessels leaving the St. Lawrence must clear out,—and on that day she completed her crew, which had been previously insufficient for the voyage when she left Portneuf,—obtained her clearances on the 29th, and sailed from Quebec on the 30th:—but it was held, that the dropping down from Portneuf to Quebec on the 26th was not a compliance with the warranty.³

You, of course, understand that this warranty as to sailing or departing by a certain day, or not after a certain day, is what is termed an express warranty, or a warranty that must appear on the face of the policy; and is not an implied or understood warranty, which is common to all policies, and which do not, therefore, require to appear on the face of the policy; so that, on looking at your policies you can at once see what are the warranties or obligations as to sailing or departing. And should such a stipulation appear, you must bear in mind, that it must be complied with to the very letter, and, however innocent or excusable you may have been, in not complying with the warranty, or however impracticable it might have been to do so, that, in a question with the underwriters, will be no excuse for the non-compliance and non-performance.⁴

In sailing out of harbours, down rivers, or through intricacies of navigation, for which neither you yourself nor your mate have a certificate of competency to act as pilot, you must take the assistance of a regular pilot,

3 *Ridsdale v. Newenham*, 24th January, 1815! 3 M. S. 456.

4 1 Mar. 359. 2 Park, 669.

where, either by the laws of the country, or by usage, such assistance is rendered necessary. Your obligation to employ a pilot is quite distinct from your responsibility, when you have a regularly licensed pilot on board. By a recent statute, any master or mate, upon satisfactory testimonials as to sobriety and good conduct being lodged, either with the Trinity House of Deptford Stroud, or the Sub-Commissioners of Pilotage, or other legally constituted authority in matters of pilotage, for any port or district, can be examined as to his seamanship, and his fitness to pilot any vessel of which he may be the master or the mate, within the limits for which he is so examined, and for which, if found fit to pilot the same, he receives a certificate, setting forth these limits, and the vessel for which he is so certified. This certificate is in force for one year and no longer; but it can be renewed from year to year, at the discretion of the authority by which it was granted, such renewal being endorsed on the certificate and duly signed. So long as this certificate is in force, it is a full and sufficient authority for the person to whom the same has been granted, to pilot and conduct, within the limits specified in his certificate, the vessel of which he may be the master or the mate, without the aid or assistance of any duly licensed pilot, and without being subject to any of the penalties imposed by any act or acts, or by or under any charter or charters relating to pilotage. But any person to whom the certificate has been granted, and who does not employ a duly licensed pilot, must pilot and conduct his vessel without the aid or assistance of any unlicensed pilot; and no authority in pilotage can grant any such certificate, in respect of any part or place in which they have no jurisdiction in matters of pilotage, and where a concurrent (conjunct) jurisdiction exists, such certificate is not valid, unless granted by each and every of the competent authorities having jurisdictions in the port or district for which the same is granted.⁵

1 In all other instances, therefore, unless those in which you or your mate may be legally qualified to act as pilot, you are bound to have a pilot on board in all

places where, by law or usage, a pilot is necessary, or in a place which is held to be in pilots' fairway; but there is no doubt that it will be a sufficient discharge of this duty, if you take on board, as pilot, any person, who by the custom of the port, or by the law of the place, is authorised to act as pilot, provided he be not incapable, from intoxication or such other cause, of performing his duty as such; and if a licensed or qualified pilot cannot be had, you are bound to take the assistance of those persons who are locally acquainted with the navigation.⁶ The general rule is, that the masters of ships in the foreign trade must put their vessels under the charge of a pilot, both in the outward and homeward voyage, when required by act of parliament to do so, within the limits of every pilot's establishment.⁷ In going out of harbour, there will, in general, be no difficulty as to having a pilot on board, because you have the power to procure one; and, unless when you or your mate are certified for the port, it seems to be imperative on you not to sail without one. As to this there can be no difficulty; and, therefore, leaving your duty in regard to having a pilot at your port of destination, and on your return to a home port, I will detail to you some of the leading enactments of the Pilotage Acts, as to the employment of pilots on the coasts of this country.

In England, the most important corporation for the appointment of pilots, is, the corporation of the Trinity House of Deptford Stroud, which appoints and licenses fit and competent persons, duly skilled to act as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing, as well up and down, or upon the rivers Thames and Medway, and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, between Orfordness and London Bridge, as also from London Bridge to the Downs, and from the Downs westward, as far as the Isle of Wight, and in the English Channel, from the Isle of Wight up to London Bridge.⁸ The Lord War-

⁶ *Thomson v. Bisset*, 3 June, 1826. 4 S. D. 670.

⁷ *Law v. Hollingsworth*, 1797. 7 T. R. 160.

⁸ 6 Geo. 4, c. 125, § 2.

den of the Cinque Ports,* and Constable of Dover Castle, or his lieutenant, can also appoint and license fit and competent persons duly skilled as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing from or by Dungeness up the rivers Thames and Medway, to London Bridge and Rochester Bridge, and the several channels, creeks, and docks of the same, and from the west buoy of the Brake, to the eastward, as far as the west end of the Owers; and, at all reasonable times, by day and night, a proper and sufficient number of Cinque Port pilots, not less than eighteen at one time, must constantly ply at sea, or be afloat, between the South Foreland and Dungeness, to take charge of ships coming from the westward; and they must not allow a vessel, having a signal for a pilot flying, to pass, without attempting to board her.⁹ The corporation of the Trinity House of Hull and Newcastle are authorised to appoint sub-commissioners of pilotage, to examine pilots, and give licenses for them to pilot ships and vessels into or out of any ports, harbours, or places, within the limits of their respective jurisdictions.¹ There is also a corporation established by statute for the regulating and licensing of pilots for the port of Liverpool; and other pilots are appointed under local harbour acts, or ancient charters of incorporation. But the names of all pilots appointed or licensed by any body, politic or corporate, or by any other person, must be transmitted to the Trinity House and Commissioners of Customs, London; and a list, corrected up to the 31st December in each year, of the names and residences of all the pilots within their several jurisdictions, must be transmitted to these bodies, and, in the list transmitted to the Trinity House, there has to be stated any alterations in the rates of pilotage chargeable, or in the rules or regulations for governing pilots within their respective jurisdictions.²

The General Pilots' Act contains some enactments of general application, which it is necessary you should know, and of which, therefore, I give you the following summary:—

* The Cinque Ports are—Dover, Sandwich, Romney, Hastings, Hythe, and the ancient towns of Winchelsea and Rye.

9 § 14, 18. 1 § 6. 2 § 35.

A particular description of every pilot is written in or upon, or endorsed on the back of, his license; and, on receiving a pilot on board, the master must inspect his license. Should he have reason to think that such pilot is not the person to whom the license was granted, the master must transmit a copy of it to the corporation or other authority by which it has been granted, stating the date thereof, with such an account and description of the person who produced the same, as may lead to the discovery of the offender.³

Every pilot must write his christian and surname in the log-book of every ship or vessel entering the port of London, and requiring to be piloted; and, if he insert a false name, he forfeits £20. In making the entry or report of his vessel inwards, the master must insert, or cause to be inserted, the name or names of the pilot or pilots employed or engaged to pilot his vessel into the port, which insertion must be made in such entry or report, without fee or reward, by the proper officer of the customs, who must report the same to the Trinity House daily, and to the Lord Warden of the Cinque Ports monthly; and that officer can reject such entry or report, unless and until the name or names of such pilot or pilots be so inserted, or notified to the officer for insertion. The principal searcher or clearing officer at Gravesend must demand and take the name or names of the pilot or pilots of all vessels clearing outwards from the port of London; and he transmits monthly lists of the names to the Trinity House, on pain of forfeiting a sum not exceeding £10, nor less than £5, to be paid by each and every person neglecting to comply with any of these regulations.⁴

A master who acts himself as pilot, or who employs, or continues employed, as pilot, any unlicensed pilot, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot, licensed and qualified to act as such, within the limits within which the ship may then actually be, has offered to take charge of the ship, or has made a signal for that purpose,—forfeits, for every such offence,

double the amount of the sum legally demanded for pilotage; and, over and above, he forfeits for every such offence an additional penalty of £5 for every 50 tons burthen of the ship, if the Trinity House, (as to cases where pilots licensed by or under that corporation are concerned,) or the Lord Warden, or his lieutenant, (as to cases when the Cinque Port pilots are concerned,) think proper that the person prosecuting of this additional penalty, and certify the same in writing.⁵ But, when the vessel is in charge of an unlicensed person, and a pilot duly licensed and qualified offers to take charge, that offer must, in order to charge the master with the penalty, be made to or in the presence of the master;⁶ and, in order to incur the penalty, the pilot must, at the time of offering his services, and as required by the statute, produce his license to the master.⁷

A licensed pilot, within the limits of his license, and the extent of his qualifications as therein expressed, can lawfully supersede in the charge of a ship or vessel any person not licensed to act as a pilot, or not licensed to act within such limits, or acting beyond the extent of his qualification; and every person assuming or continuing in the conduct of any ship or vessel without being a duly licensed pilot, or duly licensed to act as a pilot, within the limits in which the ship or vessel may then actually be, or beyond the extent of his qualification as expressed in his license, after any pilot duly licensed and qualified to act has offered to take charge,—such person, for every such offence, forfeits a sum not exceeding £50, nor less than £20.⁸ But any person whatsoever may lawfully, and without being subject to any penalty, assume or continue in the charge or conduct of any ship or vessel as a pilot, where and so long as a pilot duly licensed and qualified has not offered to take charge, or made a signal for the purpose, or when and so long as a ship or vessel is in distress, or under circumstances which render it necessary for the master to avail himself of the best assistance which, at the time, can be procured.⁹ And, nothing in the act extends, or can be construed to ex-

⁵ § 58.⁶ *Peake v. Carrington*, 2 B. B. 399.⁷ *Hammond v. Blake*, 10 B. C. 424.⁸ § 70.⁹ § 71.

tend, to subject the master or owner in any of the penalties of the act for employing any person or persons whomsoever as pilot or pilots in and for the assistance of his ship or vessel whilst the same is in distress, or in consequence thereof, or under any circumstances which render it necessary for the master or owner to avail himself of the best assistance which at the time can be procured.¹

Every licensed pilot who, when not actually engaged in his capacity of pilot, refuses or declines, or wilfully delays to go off to, or on board of, or to take charge of any ship or vessel wanting a pilot, and within the limits specified in his license, and of which he is qualified to take charge, upon the usual signal being displayed from that ship or vessel, or upon being required so to do by the master or other persons having the command; or by any person or persons interested therein as principal or agent; or upon being required so to do, in either of the cases aforesaid, by any officer of the corporation or society to which that pilot belongs; or by any principal officer of the customs, unless, in any of the cases aforesaid, it be unsafe for the pilot to obey the signal, or comply with the requisition, or he be prevented from doing so by illness or other sufficient cause to be shown by him; and every licensed pilot who, on any frivolous pretext, quits a vessel, or declines the piloting thereof, after he has been engaged to do so, or after going alongside thereof before the service has been performed for which he has been hired, and without leave of the master, or other person in command, that pilot forfeits, for every such offence, any sum not exceeding £100, nor less than £10, and is liable to be dismissed from being a pilot, or suspended as such.²

In case any licensed pilot employ or make use of, or compel, or require any person having the command or charge of any ship or vessel, to employ or make use of any boat, anchor, cable, hawser, or other matter or thing, in or for the service or pretended service of that ship or vessel, beyond what is actually and *bona fide* necessary and proper for the use thereof, with the intent thereby

1 § 61.

2 § 72.

to enhance or increase the charge or expense of pilotage or pilot assistance of that ship or vessel, whether for the gain or emolument of himself, or any other person or persons whomsoever, then, and in every such case, the person so offending forfeits and pays a sum not exceeding £50, nor less than £10, and is also liable to be deprived of his license, or suspended from acting as pilot.³

In case any licensed pilot lend his license to any unlicensed person, to assist him in acting, or claiming to act, as a licensed pilot, or, in case such unlicensed pilot, or any person not being a pilot, but acting under pretext or colour of being a pilot, render himself, by drunkenness, incapable of conducting any ship or vessel, or wilfully or negligently run such on shore, or lose or injure the same, or the tackle or furniture thereof, or wilfully and knowingly conduct, lead, decoy, or betray any ship or vessel into danger, or unnecessarily or improperly cut any cable or cables of or belonging to any ship or vessel, or cause or procure the same to be cut unnecessarily and improperly; or if any such person, by wilful misrepresentation of any circumstances upon which the safety of any ship or vessel may appear materially to depend for the time being, obtain or endeavour to obtain the charge and conduct of any such ship or vessel, then, and in every such case, the person so offending, or who aids in, procures, abets, or connives at the committing of any such offence or offences, besides being liable in damages, forfeits and pays a sum not exceeding £100, nor less than £20; and if such person be a pilot, he is also liable to be deprived of his license, or suspended from acting as a pilot.⁴

If any pilot, having the charge or direction of any ship or vessel within the distances appointed for the mooring and unmooring, moving or removing, of ships from the respective entrances into the docks of the port of London respectively, from the river Thames, and either intended to go into, or having recently come out of, the companies docks respectively, should neglect or refuse to obey such orders or directions as may, from time to time, be given to such pilot by the dock master

or dock masters appointed by the said companies respectively, under and by virtue of and agreeably to the powers vested in him and them, by any act or acts of parliament, touching or relating to the mooring, un-mooring, moving, or removing, of such ships or vessels so being under the charge or direction of the pilot as aforesaid, then, and in every such case, the pilot so offending, forfeits and pays a sum not exceeding £50, nor less than £20; and he is liable to be dismissed from being a pilot, or suspended from acting as such.⁵

Every master or other person having the command, for the time being, of any ship or vessel, who reports, or is privy, or consenting to any other person reporting, to any pilot taking the charge of such ship or vessel, a false account of her draught of water, forfeits or pays for every such offence, in addition to the full rate of pilotage to the pilot entitled thereto, double the amount of such pilotage; and any master or other person having the command, for the time being, of any ship or vessel, or having any interest, share, or property therein, who fraudulently alters any mark in the stem or stern-post thereof, denoting the draught of water, he, for any such offence, forfeits and pays the sum of £500.⁶

No owner or master of any ship or vessel is answerable for any loss or damage which may happen to any person or persons whatsoever, from or by reason or means of no licensed pilot being on board, or of no duly qualified pilot being on board thereof, unless it be proved that the want of such licensed, or duly qualified pilot respectively, has arisen from any refusal to take such licensed or qualified pilot on board, or from the wilful neglect of the master in not heaving to, or using all practicable means, consistently with her safety, for the purpose of taking on board any pilot who is ready and offers to take charge.⁷ But nothing in the act extends to make the owner liable, in any such case, for any loss or damage beyond the value of the ship and her appurtenances, and the freight due or to grow due for and during the voyage, wherein such loss or damage may happen to arise.⁸ And no owner or master is answer-

5 § 75.

6 § 64.

7 § 53.

8 § 54.

able for any loss or damage which may happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot, acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of the act, where and so long as that pilot is duly qualified to have the charge of that ship or vessel, or where and so long as no duly qualified pilot offers to take charge thereof.⁹ But nothing in the act deprives any one of any remedy or remedies upon any contract of insurance, or of any other remedy whatsoever, which such person might have had if the act had not passed, by reason, or on account of the neglect, default, incompetency, or incapacity of any pilot duly acting in the charge of any ship or vessel, under or in pursuance of any of the provisions of the act, or by reason or on account of no pilot, or of no duly qualified pilot being on board, unless it be proved that the want of a pilot, or of a duly qualified pilot, has arisen from any refusal to take a pilot, or duly qualified pilot on board, or from the wilful neglect of the master in not heaving to, or using all practicable means, consistently with the safety of the vessel, for the purpose of taking on board any pilot who is ready and offers to take charge.¹

In reference to the enactments of the act already referred to, it has been judicially observed, that the object of the legislature in establishing pilots, was, to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships in places where, from local causes, navigation is attended with more than common difficulty. To effect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board, and to give up to him the navigation of the vessel; the master, however well qualified to conduct the vessel himself, is bound, under a penalty, in a great measure to divest himself of its control, and to give up the charge to the pilot. As a necessary consequence, the master and owner are exempted from responsibility, for acts resulting from the

mismanagement of the pilot. But the legislature has considered that there may be some class of cases in which the presumption of due competency on the part of the master is so great, as to make it safe to relieve him from the obligation of taking a pilot, if he chooses to navigate for himself; still, however, making it the duty of the pilot to serve, if required so to do, and in most of the excepted cases preventing the master from employing any person other than a licensed pilot, if he does not undertake the management himself. The language, in which the legislature has exempted masters and owners from responsibility on account of accidents arising from the fault of the pilot, is certainly comprehensive enough to embrace those latter cases, as well as those in which the taking of a pilot has been made a matter of absolute obligation; and it may have been considered desirable to give this extended exemption, as an inducement to take a pilot, even in cases where such a course might, perhaps, be safely dispensed with. It is always the interest of the public, that the ship should be under the control of a pilot, because the legislature has taken what it considers due security for his competency; and, therefore, even where taking a pilot is optional, on the part of the master, the legislature may well have intended to encourage his employment, by extending to such a case the benefit of exemption from responsibility in the 55th section.²

In another case, the same learned Judge remarked, that the words in the 70th section mean, the taking the charge and direction, as a pilot, whose appropriate and, indeed, sole duty it is, to select the course, and to take the management and conduct of the vessel, for the purpose of directing her in that course. The master of a vessel may, if he pleases, perform that duty himself; but, if he chooses to employ another for the purpose, he must employ a licensed pilot, and an unlicensed person taking that duty on himself, by command of the master, when a licensed pilot offers his service, would be liable to the penalty in the 70th section. But the master is not precluded from employing any moving power he may

² Parke B. in *Lucy v. Ingram*, H. T. 1840. 6 M. W. 315.

in which the masters of ships are exempted from penalties for not taking a pilot, but in which, nevertheless, it is impossible to believe, that the legislature did not mean to make it the duty of the pilot to serve, if called on.⁴

But the master of any collier, or of any vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive, and the Baltic, (all such vessels having British registers, and coming up by the North Channel, but not otherwise;) and any Irish trader using the navigation of the rivers Thames and Medway, or of any vessel employed in the regular coasting trade of the Kingdom, or of any vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any vessel of the burthen of 60 tons, and having a British register, or of any other vessel whatsoever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place to which particular provision has been made by any act or acts of parliament, or by any charter or charters, for the appointment of pilots—the master may lawfully, and without being subject to any of the penalties imposed by the act, conduct or pilot his own vessel, when and so long as he shall conduct or pilot the same, without the aid or assistance of any unlicensed pilot, or other person or persons than his ordinary crew.⁵ And the master or mate of any vessel being owner or a part owner thereof, and residing in Dover, Deal, or the Isle of Thanet, is not subject to any penalty for conducting or piloting his own ship or vessel from any of these places, up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports.⁶

Tables of the rates of pilotage are hung up at the several custom-houses of the ports in England, to which the rates apply; and printed copies of the by-laws, rules,

⁴ Parke B., in *Lucy v. Ingram*, ut sup.

⁵ 6th Geo. 4th, c. 125, § 59.

⁶ § 62.

and regulations are also hung up at the several custom-houses of the ports, within the limits of which pilots are licensed.

In Scotland, the principal institution for the appointment of pilots, similar to the Trinity House of Deptford Stroud, is the Trinity House of Leith, which is an old institution regulated by statute for the appointment of pilots, and for prescribing rules and regulations for the due performance of their duty and their good conduct. But, in general, pilots in Scotland are left to the ordinary rules of the maritime law; and local pilots are appointed, either under local statutes or harbour acts, or by individuals or exportations, who, by grant or long usage, have acquired the right of appointing them,—as, for instance, the magistrates of Edinburgh in appointing pilots for the port, harbour, and roads of Leith.

Persons applying to be admitted pilots by the Trinity House of Leith, must, besides being qualified by having been actually engaged and employed as seafaring men for seven years, and having sailed during that space for three years or longer in a square-rigged vessel, undergo an examination by the masters and assistants, with regard to their skill, knowledge, and experience in navigating, piloting, and conducting vessels of whatever description, sailing and navigating up and down, inwards and outwards of the Frith of Forth, in and through the seas and friths, and along the coasts and islands of the Northern and German oceans, and in and through, and along, or upon the seas, friths, sounds, bays, inlets, and along the coasts of Scotland, and of the Orkney, Shetland, and Lewis Islands; and the examination being satisfactorily made, the Trinity House license and authorise the persons so examined and found qualified to act as pilots for all vessels, either generally over the whole, or within such particular port or ports, or subdivision of the bounds or limits before mentioned, as may be expressed in his license, according as such person may, upon his examination, be found properly qualified.⁷

With the exception of the right of the magistrates and council of Edinburgh to appoint pilots for the navi-

⁷ 1 Geo. 4, c. 37, § 32.

gation of the port, harbour, and roads of Leith, and the liberties or privileges previously granted by any act of parliament, to pilots licensed by any other body, corporate or politic, or other persons within Scotland, empowered by act of parliament to license pilots, or the authority of any such body or other persons having separate jurisdiction in matters of pilotage within one port or district in Scotland,⁸—the pilots licensed by the Trinity House have the sole and exclusive right and privilege of navigating, piloting, and conducting all merchant and trading vessels up and down, along and within the Frith of Forth, from a line running directly from St. Abbs' Head, on the south side or shore, to Fifeness, on the north side or shore, up to Carron Roads; and the Trinity House have the sole and exclusive right to license and authorise pilots, and possess the sole and exclusive jurisdiction in all matters of pilotage, within these limits. No unlicensed person must, after the appearance and offer of service of a licensed person, navigate, pilot, or conduct any vessel within the limits now mentioned, upon any ground or pretext whatever, provided such licensed pilot appear and make offer of his services within an hour after the vessel has hoisted and kept constantly flying, the usual signal for a pilot, the time to be ascertained by the oath of the master; and, excepting cases of danger by stress of weather, where, before a licensed pilot has appeared and offered his services, it may be necessary to employ any unlicensed person.⁹

As soon as the Trinity House licenses any pilot, his appointment as pilot must be published, by fixing up a written notice thereof at the Trinity House of Leith, and at the respective custom-houses of the ports within the limits of his license, which notice must specify the extent of his license; and, in the month of January, yearly, the Trinity House must cause to be printed and sent to each of the custom-houses in Scotland, to be there hung up in some conspicuous place, an accurate list of all the pilots licensed by the corporation, and acting under their authority for the time, specifying the limits of each pilot's license.¹

8 § 36.

9 § 33.

1 § 44.

No licensed pilot must take charge of any vessel, or in any manner act as a pilot, or receive any compensation for so acting, until his license be noted or registered by the officers of the custom-house of the place at or nearest to which he resides, which they must do without fee or reward; nor without having his license at the time of his so acting, in his personal custody, and actually producing the same to the master or other person desirous of employing him as a pilot, under a penalty to the corporation, of a sum not exceeding £3 for the first offence, and not exceeding £5 for the second offence, and under the penalty of forfeiture of his license for any subsequent offence.²

Every licensed pilot is entitled, provided he appears and makes offer of his services within the time already mentioned, to supersede in the charge of any vessel, within the limits of his license, any person not licensed as a pilot, or any person not licensed within the limits in which such vessel may be for the time; and every master or other person in command or charge of any vessel within the limits above specified, of the jurisdiction of the corporation, in matters of pilotage, who, after a licensed pilot has offered to take charge, allows any unlicensed person, or any licensed pilot acting out of the limits of his license, either to continue in or to assume the charge, as pilot; and every person, who either assumes or continues in the charge or conduct of any ship or vessel, as pilot, without being duly licensed to act within the limits in which such ship or vessel may actually be for the time,—for every such offence, forfeits and pays to the corporation, double the amount of the sum which would have been exigible for the pilotage, over and above a penalty or sum, not exceeding £5, to be applied in the manner mentioned in the act.³

All persons licensed to act as pilots, by the corporation or their committee, are subject to and under the control, regulation, and government of the corporation and their successors, or of the committee to be appointed by them, or of the masters of the corporation, in such manner as has already been, or may from time to time be,

directed and approved of by the corporation, by any by-law or by-laws to be from time to time passed by them, by virtue of the act relative to the regulation and government of pilots, or any other matter of pilotage.⁴ The present by-laws have been approved of by the Lord President of the Court of Session, and are hung up in a conspicuous place in the several custom-houses in Scotland, and in the Trinity House of Leith.⁵

If any licensed pilot, on any groundless or frivolous pretext, or without good, lawful, and sufficient cause, to be immediately assigned and shown by him, declines or refuses to take charge of any vessel, when required, and when disengaged; or on being required by the master, or other person having charge, of any merchant vessel, he declines to go on board of that vessel; or when required by any principal officer of customs, or by any person interested as principal or agent for or on behalf of any vessel wanting a pilot, or after he has seen the signal for a pilot hoisted, shall decline to go off to and take the charge of the vessel, when it is safe to do so; or in any way delays going on board the vessel, and taking charge thereof, or quits the same, or declines the piloting thereof, after he has been engaged, without leave of the owner, master, or other person having the chief command or charge, and before the service has been performed for which he was hired; or if he exact, or demand, or bargain for, any other or greater payment, charge, or reward for pilotage than is allowed by the rates legally established by the corporation, and in observance for the time being; or renders himself incapable by drunkenness of conducting a vessel; or, from negligence, gross ignorance, or intention, runs any vessel on shore, or loses, or does any injury to the same, or to the tackle or furniture thereof; or lends his license to any unlicensed person, to enable or assist him to act, or claim to act, as a pilot; or aids and assists any person or persons engaged in any smuggling transaction;—such pilot forfeits and pays, to the corporation, for every such offence, any sum not exceeding £10, and is liable to be dismissed from being, or suspended from acting, as a pilot, at the discretion of the corporation.⁶

If any such licensed pilot wilfully and knowingly conducts, leads, decoys, or betrays any vessel into danger,—or unnecessarily or improperly cuts, or causes to be cut, any cable or cables of or belonging to any vessel,—or by wilful misrepresentation of any circumstance, upon which the safety of any vessel may appear to depend, for the time being,—or obtains, or endeavours to obtain, the charge and conduct of any vessel,—then, and in every such case, the pilot so offending, or aiding in, procuring, abetting, or conniving at the committing of any such offence, forfeits and pays to the corporation a penalty or sum not exceeding £5, and may further be either dismissed from being, or suspended from acting as, a pilot, for a limited period, at the discretion of the corporation.⁷ And if any such pilot employ or make use of, or cause or require to be employed or made use of, any boat, anchor, cable, hawser, or any other matter or thing, in or for the service, or pretended service, of any vessel, beyond what is actually and *bona fide* necessary and proper for the use thereof, with intent thereby to enhance or increase the charge or expense of pilotage, whether for his own gain and emolument, or for the gain and emolument of any other person or persons whomsoever,—such pilot, in every such case, forfeits and pays to the corporation a penalty not exceeding £5, and is also liable to be deprived of his license, or to be suspended from acting as a pilot, for a limited time, at the discretion of the corporation.⁸

No licensed pilot must be taken to sea by the master or other person in command of any vessel, excepting in case of absolute and unavoidable necessity; and if so taken to sea, he must receive 10s. 6d. per day, until he be returned to the port or place where he was taken on board, or has been discharged from the ship a sufficient time to have enabled him to return there.⁹ On the arrival of any vessel at, and as soon as she is safely brought to anchor in, any port or harbour, or roadstead, within the bounds or limits aforesaid, or as soon as such vessel quits or leaves these bounds or limits, the pilot can then demand the pilotage due to him, according to the table,

7 § 47.

8 § 47.

9 § 49.

and he can quit the vessel forthwith, unless he be expressly required by the master, or other person in charge, to remain longer on board, in which case he must comply, only he is entitled to 7s. per day, for all the time he may be so detained, over and above his fees of pilotage;¹ and in case the charges for pilotage are not instantly paid, all sums of money due for pilotage to any licensed pilot, can be recovered from the owners or masters of all vessels not foreign, or from the consignees or agents thereof, or any other person who has paid, or made himself liable to pay, any other charges for the vessel, in her port of delivery, and can be recovered in Scotland in the same manner as any other charge for the vessel can be recovered; and in England or Ireland, according to the laws and practice of these kingdoms.²

But no owner or master of any vessel is answerable for any loss or damage, nor is the owner or owners of the vessel, or any owner or consignee of goods, prevented from recovering any loss or damage, upon any contract of insurance, or upon any other contract relating to any ship or cargo on board, for or by reason or in respect of any neglect, default, incompetency, incapacity, or misconduct of any pilot taken on board, under, or in pursuance of, or in conformity to, the provisions of the act.³ The same remarks apply to this enactment as I have made in reference to the similar enactment in the English Pilotage Act.

There is another matter to which you require to attend, viz.,—by the statute now mentioned, it is enacted that every person who rides by, makes fast to, or removes, or wilfully runs down, or runs foul of, any vessel appointed or placed to exhibit lights, or any buoy or beacon belonging to the corporation of Trinity House of Deptford Stroud, or belonging to, or placed by, any other corporation having lawful authority,—besides being liable to the expense of replacing or making good the damage,—forfeits, for every such offence, a sum not exceeding £50, nor less than £10.⁴ You will also bear in mind, that you cannot hoist, carry, or wear in or on board, the royal jack, commonly called the union jack,

1 § 53. 2 § 54. 3 § 56. 4 6 Geo. IV, c. 125, § 91.

or any pendant, or any such colours as are usually worn by her Majesty's ships, or any jack, flag, pendant, or colour, made in imitation of or resembling those of her Majesty, under the penalty of forfeiting a sum not exceeding £500.⁵ And you also know that, in passing any vessel of the navy, you must strike the uppermost sail your own vessel is then carrying, under the pain of your vessel being arrested, and proceeded against for contempt.

I am, &c.

⁵ 8 and 9 V., c. 57, § 10.

LETTER VI.

Conduct towards seamen, and regulations for their health and discipline—character of men—how they must be treated—how they must be punished—disobedience and insubordination—corporal punishment—punishment of mutiny, &c.—what offences master cannot punish—how punishment should be inflicted—how commands should be given and enforced—conduct to apprentices—authority over—chastisement of—power of complaining to justice of peace—regulations of Mercantile Marine Act as to health, size, and construction of place appropriated to each man—supply of medicines, &c., on board—scale issued by Board of Trade—medical inspectors—inspection of medicines, &c.—certificate of inspection—penalty for sailing without—weights and measures to be kept on board—seamen hurt or injured in service of ship—expense of providing medical advice, &c.—punishment for wilful breach of duty—neglect of duty, or drunkenness causing loss or serious injury to ship, &c.—mode of punishment—periods of imprisonment for certain offences—reduction of provisions—fines to be deducted from wages—and paid to shipping masters—seaman absenting himself, or deserting—punishment of—absence within twenty-four hours of sailing—penalty and forfeiture for absence or desertion—provisions of Mercantile Marine Act for checking desertion—punishment of—master or owner may give deserters, &c., in charge without a warrant—on voyage seaman absent without leave can be carried on board—both imprisonment and forfeiture may be inflicted—misdemeanors punishable by fine or imprisonment—offences committed out of her Majesty's dominions—offender to be sent home—naval court on voyage—constitution of court—powers of—report by—costs of proceedings—master's general powers of punishing—caution to be observed.

GENTLEMEN,

Having, then, completed your crew, laden the cargo, and cleared at the custom-house, and all ready to sea, let me now call your attention to what should be your conduct towards your seamen, and what are the regulations as to their health and discipline during the voyage. This is partly left to your own good sense and the common law of the country, and partly, it is regulated

by express statute law. Allow me, in the first place, to make some observations in reference to the former.

You need not be told, that, although a most useful class of men, they are generally ignorant and illiterate; that, although exposed to constant hardships, and habitually buffeted by tempests, they are notoriously reckless and improvident; and that, excluded, in a great degree, from civilized society, and the comforts of domestic life, they have few means of obtaining or acquiring solid or useful information. When on shore, they are too often the victims of intoxication, vice, and fraud; and when at sea, they are as often the victims of tyranny and oppression. For these reasons, they are a class of men peculiarly requiring protection,—both against the acts of others, and against themselves; and it is on these accounts, that the legislature has, as far as it can, extended its protection towards them.

Knowing the men, therefore, that you have under your charge, you are not to treat them as slaves, but to manage them as grown-up children,—members of your family, who are to be kept in subordination and obedience. Your authority over them has been compared to the authority of a master over his apprentices, or of a school-master over his scholars; that is, as a master can inflict corporal punishment upon his apprentices and scholars for acts of disobedience and insubordination, and to force compliance with his orders,—so you are entitled, upon the same grounds of necessity, and in the due exercise of a sound discretion, to exercise your authority in a similar manner, though in a different degree, corresponding to the extent of the disobedience and the obstinacy of the insubordination. Disobedience to lawful commands is a heinous offence in the eye of the law; and, if allowed to pass unpunished, would be fatal, equally to the safety of the ship and cargo, and of the lives of all on board. For these reasons, the law has armed you with the authority necessary for the proper and safe navigation of the vessel, and for the preservation of good order and discipline on board; but it is not every grumble at obeying orders, that must be construed into disobedience, nor every intemperate expression that must

be looked upon as insubordination ; and you will find that your passion is both a bad counsellor and a bad guide, in vindicating your authority, and enforcing the necessary discipline. In all cases, where corporal punishment absolutely requires to be inflicted, (which, under judicious management, it is to be hoped will be seldom,) the act of punishing should, when delay can be afforded, be preceded by a calm and dispassionate inquiry into the offence, in council with the officers and passengers ; and, when the offence is fully established, then the punishment should be awarded with coolness and equanimity, and inflicted with moderation. Such a course of proceeding will have a salutary effect on the rest of the crew, and will convince them that punishment will be inflicted, not from caprice or passion, but as a just retribution for the offence.

Cases may, no doubt, occur, which may not admit of this delay and deliberation, and where the nature of the offence justifies the extreme measure taken to punish it. Such are the prompt and vigorous measures, which require to be taken to suppress the disorders with which mutiny commences, or where the act of disobedience is so flagrant, as, if not promptly punished, may endanger the lives of all, and the property on board, or where the offence is committed in so public a manner as to be exposed to all.

These, and such like, however, speak for themselves, and may be considered rather as exceptions to the general rule I have above noticed, or as dispensing with the observance of it. But there is another class of cases, in which you have no power to inflict any punishment at all, and in which the offender must be left to the proper tribunal of his country. These are all acts and offences which, by the laws of this country, are properly crimes ; and, when any of these are committed on board your ship, your duty is, to secure the offender and bring him home for trial, before the proper judge ; and, for this purpose, you can confine the offender for the safety of the ship, and the lives of those on board, provided it is not more severe and close than is necessary.

In general, however, you may take it as a safe rule,

that, in a case where it is absolutely necessary for you to cause corporal punishment to be inflicted, that punishment must be applied with moderation, and in a much less degree than the offence; and for the lesser or more common offences, as intoxication, or temporary violence, or casual disobedience, the restraint of confinement is the proper punishment. Even that should be used as a preventive measure, to guard against a repetition of such offences in future; and the contrition of the offender should be the warrant for his release, accompanied, in the presence of the crew, with a suitable reprimand for the conduct which led to his confinement, and an admonition as to the propriety of his behaviour in future. In no case should the correction or confinement be excessive or vindictive, or proceed from any intemperate passion, or, what you may consider, offended dignity; for, should such be the case, rest assured that the effect produced upon the crew will be quite the reverse, from that which a reasonable and due correction, calmly and temperately awarded, ought to produce. And you should recollect, that where a seaman has been unduly corrected or rigorously punished, during the course of a voyage, he has his action of damages against you on his return to this country; and, in that action, it will be necessary for you to show that you were fully justified in what you did. For this purpose, it is most essential, that there should be accurately entered in the official log-book, the particulars of every offence which calls for punishment, and the true extent of the punishment awarded; and that this entry should be authenticated by the subscription of yourself, of your officers, and two or more of the crew.

You should also bear in mind, that nothing will justify you in personally striking a seaman, without just cause, or in giving him a blow, however hasty and intemperate that may be. The seamen are your servants, and not your slaves; and, although violence and passion may make you feared, they can never make you be obeyed with that spontaneous and hearty obedience, which a voluntary and a willing servant ought to render. Your commands should be given with the utmost firmness, no doubt, and obedience to them should be punctually and

promptly exacted ; but these commands should be in the language of mildness, not of passion and intemperance ; and that obedience should be enforced with the same firmness with which the commands are given, and not by oaths and violence. It should be your study to unite firmness with mildness, and to make yourself respected as a master, and not feared as tyrant ; and, when your seamen know this, and, at the same time, see you solicitous to promote their comfort, you may expect that their obedience will flow from a right principle, and that none of these unseemly disturbances will arise, which too often are occasioned by the violent language, or by the harsh and violent treatment, of the master. I need hardly add, that your mates have no power of punishing ; and that, should an offence occur in your absence, they have only the power of putting the offender under restraint on board, when necessary for the general safety, until you return.

From what I have said, your conduct to the apprentices may be easily inferred. You cannot, as I am afraid is too commonly the case, buffet them as you please, nor make them the scape-goats on whom your passion or ill nature can find unrestrained vent ; and although they, no doubt, may often stand in need of chastisement, yet, their neglect or misbehaviour will generally be in small matters, and of trifling consequence, and the chastisement ought to be so accordingly. Keep always in mind the saying of Solomon, that "a merciful man is even merciful to his beast."

Let us now see the statutory regulations for seamen during the voyage ; and these relate, either to their health,—the preservation of discipline,—the checking of desertion,—or the punishing of offenders.

The 63rd section of the Mercantile Marine Act enacts, that every place in a ship or sea-going vessel occupied by the seamen or apprentices, and appropriated to their use, must have a space of nine superficial feet for every adult, measured on the deck or floor of the place, which must be kept clear from stores or goods of any kind, not being their own personal property in use during the voyage, and every such place must be securely and properly

constructed and well ventilated ;¹ and, if the place so occupied by the seamen or apprentices, and appropriated to their use, is not, in the whole, sufficiently large to give the space as before required, or, if any such place is not securely and properly constructed and well ventilated, the owner, for every such offence, is liable to a penalty not exceeding £20 ; and if that space is not kept free from goods and stores, the master, for every offence, is liable to a penalty not exceeding £10.²

By the General Merchant Seamen's Act, it is enacted that every ship navigating between the United Kingdom and any place out of the same, must have and keep constantly on board a sufficient supply of medicines and medicaments, suitable to accidents and diseases arising on sea voyages, in accordance to the scale which is from time to time, or at any time, issued by the Board of Trade, under the Mercantile Marine Act, and published in the *London Gazette* ; and every ship (except those bound to European ports, or ports in the Mediterranean,) must also have on board a sufficient quantity of lime or lemon juice, sugar, and vinegar, to be served out to the crew whenever they have been consuming salt provisions for ten days ;—the lime or lemon juice daily, at the rate of half-an-ounce per day each, and the vinegar at the rate of half-a-pint, weekly, to each person ; and, in case any default be made in providing and keeping such medicines, medicaments, and lime or lemon juice, sugar, and vinegar, the owner incurs a penalty of £20 for each and every default ; and, in case of default of serving out the lime or lemon juice, &c., the master incurs a penalty of £5 for each and every default.³ But, in the case of ships bound to any ports in her Majesty's dominions in North America, the Board of Trade can, by general regulations, dispense with the observance of so much of the above section, as relates to lime or lemon juice, &c., and can limit such dispensation to any class of these ships, and impose any conditions it may think fit.⁴

The Board of Trade and the Local Marine Boards appoint proper medical inspectors to inspect the medicines, &c., and can, subject to the sanction of the board,

1 § 63. 2 § 69. 3 § 18. 4 13 and 14 V., c. 93, § 65.

fix their remuneration. These inspectors have, for the purpose of such inspection, the same powers as the special inspectors mentioned in the act; and whenever the medical inspector reports to the collector or controller of any port, and, at the same time, to the master, owner, or consignee of any ship there lying, which is required to carry these articles, that these or any of them are deficient in quantity or quality, or are placed in improper vessels, the master must, before proceeding to sea, produce to the collector or controller, a certificate from that medical inspector, or some other, that the deficiency has been remedied or supplied, or that the improper vessels have been replaced by proper ones; and if the ship proceeds to sea, without such certificate being produced, the owner, master, or consignee is liable to a penalty not exceeding £20. But if the inspector, when required by timely notice in writing from the master, &c., make his inspection, three days at least before the ship proceeds to sea, and if the result of that inspection is satisfactory, he is not again to make inspection before the commencement of the voyage, unless he has reason to suspect that some of the articles inspected have been subsequently removed.⁵ And any person who sells or supplies any medicines, &c., of bad quality, for the use of a ship, is liable, for each offence, to a penalty not exceeding £20.⁶

Every master must keep on board proper weights and measures, for the purpose of determining the quantities of the several provisions and articles served out, and must allow the same to be used at the time of serving out, in presence of a witness, whenever any dispute arises about the quantities;⁷ and if proper weights and measures are not so kept or allowed to be used, the master, for every offence, is liable to a penalty not exceeding £10.⁸

In case the master or any seaman receive any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice, with attendance and medicines, and for his subsistence, until he has been cured, or brought back to some port in the United Kingdom, must, with the costs of his conveyance, be defrayed by the owner, without any deduction on that

5 § 66.

6 § 67.

7 § 68.

8 § 69.

account from the wages of the master or seaman; and, if paid by any officer or other person on behalf of her Majesty, the amount, with full costs of suit, can be recovered as a debt due to her Majesty.⁹

The foregoing regulations are for the preservation of the health of the crew during the voyage; the following are for the preservation of discipline on board.

Referring to the general remarks at the commencement of this letter, you will observe, the Mercantile Marine Act enacts, that, should any mate, seaman, or apprentice,—by wilful breach of duty,—by neglect of duty,—or by reason of drunkenness,—do any act tending to the immediate loss, destruction, or serious damage of his ship, or tending immediately to endanger the life or limb of any person belonging to or on board of that ship,—or who, by wilful breach of duty,—by neglect of duty,—or by reason of drunkenness,—refuses or omits to do any proper or lawful act, proper and requisite to be done by him, for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person on board thereof from immediate danger to life or limb,—the party so acting is, for each such offence, deemed guilty of misdemeanor,¹ which can be prosecuted in any court having appropriate criminal jurisdiction, and is punishable with fine or imprisonment, with or without hard labour, or both.²

If any seaman or apprentice, whilst on service, commits any of the offences now to be mentioned, and when found in any place where there is a court or justice capable of exercising summary jurisdiction under the act, the master can, on due proof of the offence, and of the entry thereof in the log-book, be summarily punished by imprisonment, with or without hard labour, not exceeding, in duration, the following periods, viz.:—1. For wilfully damaging the ship, or embezzling, or wilfully damaging any of her stores or cargo,—twelve weeks,—(besides making reparation for the amount of such damage or embezzlement.³ 2. For assaulting the master or mate—twelve weeks,—(and threatening the master, by hold-

⁹ 8 and 9 V., c. 112, § 18. 1 § 77. 2 § 107.

³ New Phoenix, Barton, 13 Nov., 1832. 2 Hag. 420.

ing the fists in his face so as to provoke him to strike, is so near an assault as to justify him in striking the first blow.⁴) 3. For wilful disobedience to any lawful command,—four weeks,—(and “as to disobedience to lawful commands,” Lord Stowell remarked, “it is an offence of the grossest kind; the court would be particularly attentive that subordination and discipline on board of ship, which is so indispensably necessary for the preservation of the whole service, and of every person concerned in it.”⁵) 4. For continued wilful disobedience to any lawful command,—twelve weeks;—and by the General Merchant Seamen’s Act, it is enacted, that, should a seaman, while he belongs to a ship, neglect or refuse, without sufficient cause, to perform such his duty as is reasonably required of him by the master or other person in command, he is subject to a forfeiture of two days’ pay for every such offence, or of six days’ pay for every twenty-four hours’ continuance thereof, or at the option of the master. The expenses necessarily incurred in hiring a substitute.⁶ 5. For combining with any other or others of the crew, to disobey lawful commands,—to neglect duty,—or to impede the navigation of the ship, or the progress of the voyage,—twelve weeks,—(and such a combination would clearly amount to mutiny, and can be quelled as such.)⁷)

And no seaman or apprentice is entitled to any pecuniary allowance on account of any reduction in the quantity of provisions furnished to him, during such time as he, wilfully and without sufficient cause, refuses or neglects to perform his duty, or is lawfully under confinement for misconduct, either on board or on shore, or during the time that such quantity may be reduced, in accordance with any regulation for reduction, by way of punishment, contained in the agreement.⁸

Whenever any act of misconduct is committed, which by the agreement, is subject to a fine, the appropriate fine (if an entry of the offence is made and attested in

⁴ *Lima*, Fawson, 28 January, 1837. 3 Hag. 346.

⁵ *Robinnett v. Ship Exeter*, 10 December, 1799. 2 Rob. 261.

⁶ 7 and 8 V., c. 112, § 6.

⁷ *New Phoenix*, *ut sup.* Susan, Hamilton, 25 July, 1829. 2 Hag. 224, n.

⁸ § 81.

the official log-book in the proper manner, and if the offence is proved to the satisfaction of the shipping master to whom the fine is to be paid,) must be deducted from the offender's wages, and every fine so deducted must be paid over by the master or owner, as follows, viz :—in the case of foreign-going ships, to the shipping master before whom the crew is discharged, and, in the case of home-trade ships, to the shipping master at or nearest to the place at which the crew is discharged; and a master or owner, who neglects or refuses to pay over any such fine, is liable, for each offence, to a penalty not exceeding six times the amount of the fine retained by him. But, if, before the final discharge of the crew in the United Kingdom, any offender as aforesaid enters into any of her Majesty's ships, or is discharged abroad, the offence must then be proved to the satisfaction of the officer in command of the ship into which he may enter, or of the consular officer, officer of customs, or other person, by whose sanction he is so discharged, and thereupon the fine must be deducted as before mentioned. An entry of the deduction must then be made in the official log-book, and signed by the officer or other person; and, on the return of the ship to the United Kingdom, the fine must, in the case of foreign-going ships, be paid to the shipping master before whom the crew is discharged, and, in the case of home-trade ships, to the shipping master at or nearest to the place at which the crew is discharged.⁹

Again, as to the means for checking or preventing desertion, both the General Merchant Seamen's Act and the Mercantile Marine Act contain sundry provisions.

By the former, it is enacted, that in case a seaman, during the progress of a voyage, at any time, neglect or refuse to join his ship, or absent himself without leave, or desert, any justice of peace in her Majesty's dominions, or the territories under the government of the East India Company, where such ship may be, or the seaman is found, can, upon complaint on oath by the master, mate, or owner, or his agent, issue his warrant, and cause the seaman to be apprehended and brought

before him. In case the seaman cannot give a reason to the satisfaction of the justice, for his neglect, refusal, or absence, as the case may be, or in the case of desertion, the justice can commit him to prison, or to the house of correction, there to be imprisoned, with or without hard labour, at the discretion of the justice, for a period not exceeding thirty days; or if the justice think fit, instead of committing the seaman, he can, at the request of the master, mate, owner or agent, cause him to be conveyed on board his ship, or delivered to the master, &c., for the purpose of being so conveyed and proceeding on the voyage. The justice can also award the costs incurred in the apprehension of the seaman, not exceeding, in any case, 40s., which is to be deducted from his wages.¹

By the same act, it is enacted, that the absence of a seaman from his ship, for any time within twenty-four hours immediately preceding her sailing, whether before the commencement or during the progress of the voyage, wilfully and knowingly, without permission, and under circumstances showing an intention to abandon the same, and not return thereto, is deemed a desertion of and from that ship.² And it is also enacted, that if, during the time or period specified for his service, a seaman, wilfully and without leave, absent himself from his ship or otherwise from his duty, he (in all cases not of desertion, or not treated as such by the master,) forfeits out of his wages, the amount of two days' pay, or, in the master's option, the amount of expenses necessarily incurred in hiring a substitute;³ and in case a seaman desert beyond seas, and the master engage a substitute at a higher rate of wages than was to be paid the seaman so deserting, the owner or master can recover from the deserter, by the same summary proceeding as penalties are recoverable under that act, any excess of wages or portion thereof, paid by the owner or master, beyond what would have been payable to the deserter had he duly performed his service.⁴

The Mercantile Marine Act contains the following further provisions for checking desertion:—

If any seaman, after signing the agreement, or any

1 8 and 9 V., c. 112, § 6. 2 § 9. 3 § 7. 4 § 9.

apprentice, deserts, and then or afterwards arrives or is found at any place where there is a court or justice capable of exercising jurisdiction under the act, that seaman or apprentice is, on proof of the offence, and, when practicable, of a proper entry thereof in the official log-book, to be summarily punished by imprisonment, for a period not exceeding twelve weeks, with or without hard labour, at the discretion of the court or justice. But, in case the master or owner, or his agent, so requires, the court or justice can, instead of committing the offender to prison, cause him to be conveyed on board for the purpose of proceeding on the voyage, or can deliver him to the master or mate of the ship, or the owner or his agent, to be so conveyed by them; and, in such case, can order the costs and expenses properly incurred by or on behalf of the master or owner, by reason of the offence, to be paid by the offender, and, if necessary, to be deducted from any wages he may have earned, or may, under the existing engagement, afterwards earn.⁵

Whenever a seaman or apprentice neglects or refuses to join, or absents himself without leave, or deserts, from the ship in which he is engaged to serve, the master, mate, owner, ship's husband, or consignee, can, for the purpose of conveying him before a justice, apprehend, or require any police officer or constable to apprehend him, without first procuring a warrant, but so as not to detain him in custody for more than twenty-four hours, or such shorter time as may, in the particular case, be reasonable, before the case is heard, or a proper warrant procured. But if such apprehension appears to the court or justice, before whom the case is brought, to have been made on improper or insufficient grounds, the master, &c., who made the same, or caused it to be made, is liable to a penalty not exceeding £20.⁶

If, in the course of a voyage, a seaman or an apprentice is found absenting himself without leave, the master, &c., in any place in her Majesty's dominions, with or without the assistance of the local authorities, and also at any place out of her Majesty's dominions, if and in

so far as the laws of the place permit, can apprehend him, and thereupon, if he so requires, and, if practicable, must convey him before some court or justice capable of hearing his complaint, to be dealt with according to law, or can, if he does not so require, or if there be no such court or justice at or near the place, at once convey him on board.⁷

In reference again to the punishment of offenders, you have now seen the punishments, by forfeiture, penalties, or imprisonment, which are attached to certain offences; and by the Mercantile Marine Act, it is enacted, that whenever, in any proceeding under the General Merchant Seamen's Act, or that act, any question arises under the General Merchant Seamen's Act, or that act, concerning any offence committed by a seaman, or apprentice, which is punishable under either of these acts, the court or justice hearing the same, may, if the justice of the case requires, order the offender to be punished, both by lawful imprisonment appropriate to the case, and, in addition, may make such order, in regard of wages accruing due in the meantime, as to the court or justice may seem fit.⁸

It has been already seen, when, under section 77 of the Mercantile Marine Act, a seaman or an apprentice, by wilful breach of duty—by neglect of duty,—or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of the ship, or immediately to endanger the life or limb of any person belonging to or on board thereof, or by refusing or omitting to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board thereof, from immediate danger to life or limb, he is deemed to be guilty of a misdemeanor; and, by the same act, it is declared, that all misdemeanors are punishable with fine or imprisonment, with or without hard labour, or both, as the court or justice may think fit, and, if the court think fit, it may order payment of the costs and expenses of the prosecution.⁹

By the General Merchant Seamen's Act, it is enacted, that all offences against the property or person of any subject of her Majesty, or of any foreigner, committed at any port or place, either ashore or afloat, out of her Majesty's dominions, by the crew, (including apprentices,) or any of them, belonging to a ship subject to the provisions of the act, or who, within three months before committal of the offence, has formed part of such crew, are held to be offences of the same nature respectively, and to be liable to the same punishment respectively, as if they had been committed on the high seas, and other places within the jurisdiction of the Admiralty of England, and are to be tried and determined in the same manner as if these offences had been committed within that jurisdiction.¹ And whenever any complaint is made to any of her Majesty's consuls or vice-consuls, of any offence having been committed by the crew, (including apprentices,) or any of them, belonging to such ship, the consul or vice-consul can inquire into the case, upon oath, and can, at his discretion, cause the offender to be placed under all necessary restraint, so far as in his power, so that he may be sent and conveyed in safe custody to England, as soon as practicable, to be proceeded against according to law.²

In this and similar offences, a new mode of procedure is introduced by the Mercantile Marine Act. It enacts, that if, whilst any ship is out of her Majesty's dominions, a complaint is made by the master or any of the certified mates, or by one-third or more of the seamen in her crew, or by the consignee, to any naval officer in command of any of her Majesty's ships, or, in the absence of the naval officer, to any consular officer,—that naval or consular officer must thereupon, if circumstances admit, and if he thinks the case requires immediate investigation, (but not otherwise,) summon a court consisting of not more than five, and not less than three members, of whom one, if possible, must be a naval officer not below the rank of lieutenant, one a consular officer, and one a master of a British ship, and the rest must be either naval officers, or masters of British ships, or British mer-

¹ 7 and 8 V., c. 112, § 58.

² § 59.

chants, and this court may include the naval or consular officer summoning the same, but must not include the master or consignee of the ship, to whom the parties complaining or complained against may belong. The naval or consular officer on the court, if there is only one, and if there is more than one, the naval or consular officer who, according to any regulations in force for the time being for settling their respective ranks, is of the highest rank, must be president of the court; and the court hears the case, and may, for that purpose, summon and compel the attendance of parties and witnesses, and administer oaths and affirmations, and order production of documents, and can discharge any seaman from his ship, and can, if the court is unanimous that the safety of the ship or crew, or the interests of the owner, absolutely require it, supersede the master, and appoint another person to act in his stead, such appointment being to be made with the consent of the consignee of the ship, if then at the place. Whether any order is made or not, the court must make a report containing a statement of the proceedings and evidence, and send it to the Board of Trade; and this report, if signed by the senior naval officer or master, or sealed with the consular seal, and produced out of the custody of the Board of Trade or its officers, is evidence in any legal proceedings.³

This naval court can order the costs of any proceedings before it (if any), or any portion thereof, to be paid by any of the parties thereto, and can order any person making a frivolous or vexatious complaint, to pay compensation for any loss or delay caused thereby. Any cost or compensation so ordered, must be paid by that person accordingly, and can be recovered in the same manner as other sums are made recoverable by the act, or can, if the case admits, be deducted from the wages; and the Board of Trade may, in any case in which it thinks fit to do so, pay the cost of any such proceedings, and make any reasonable compensation for any loss or delay thereby caused.⁴

Any person who, wilfully and without due cause, prevents or obstructs the making or investigating of any

complaint as before mentioned, is liable, for each offence, to a penalty not exceeding £50, or to be imprisoned, with or without hard labour, for a period not exceeding twelve weeks.⁵

These are the statutory rules for punishing offenders; but it is expressly declared, by the Mercantile Marine Act, that nothing therein contained for enforcing discipline during a voyage, takes away or abridges any powers which a master has over his crew. It is necessary, therefore, now to inquire what these powers are.

Referring to what has been said on this subject at the commencement of this letter, I may remark, generally, in the words of a late learned judge, that, in all acts of discipline and authority, passion is a bad counsellor; and that, on such occasions, care is to be taken to suppress even natural and honest feelings of resentment, which may have the effect of transferring a share of the blame belonging to the transaction to the other side of the question.⁶

Keeping this caution in view, I cannot do better than give you the opinion of the same learned judge, in another case, as to the master's powers of punishment. "It has hardly been disputed," he says, "that, in a case of gross misbehaviour, the master of a merchant ship has a right to inflict corporal punishment upon the delinquent mariner; that right must be supported by the law of England, which is the proper authority for fixing the limits within which one subject of the realm has a right to inflict corporal suffering upon another. Upon that ground, I dismiss all reference to authorities of the Foreign Mercantile Law, and I regret that so little upon this rule is to be found in our own. No statutable regulations exist upon this subject; the only authorities are supplied by the decisions of the courts of law, acting upon considerations of necessity and just discretion: and, upon such grounds, I think the following rules may be considered as sufficiently established. In the first place, that the punishment must be applied with due moderation. It is asserted, in some well-considered books, that the law gives the same authority to the

5 § 84. 6 Lord Stowell in the *Frederick*, 4 Dec., 1823. 2 Hag. 216.

master of a merchant ship, to chastise his mariners for misbehaviour, as a master possesses over his apprentices,—meaning, that it is inherent in him, upon the same grounds of necessity and sound discretion, in the one case as in the other,—not certainly to be used exactly in the way of an equal measure of punishment, because the apprentice is generally a youth of comparatively tender years, and whose acts of misbehaviour can hardly produce the same destructive consequences as may attend the negligence of the mariner,—an experienced person of confirmed strength, capable of sustaining a severer infliction than would properly be applied to a stripling,—and whose acts, even of negligence, may draw after them consequences fatal to all the lives and all the property on board the vessel. It is hardly necessary to add, as a corollary, that—in all cases which will admit of the delay proper for inquiry—due inquiry should precede the act of punishment; and, therefore, that the party charged should have the benefit of that rule of universal justice—of being heard in his own defence. A punishment inflicted without the allowance of such benefit, is in itself a gross violation of justice. There are cases, undoubtedly, which neither require nor admit of such deliberate procedure. Such are cases where the criminal acts expose themselves to general notoriety, by the public manner in which they are commenced, or where the necessity occurs of immediately opposing attempted acts of violence, by a prompt reaction of lawful force,—as in the disorders of a commencing mutiny;—these are cases that speak for themselves, and are of unavoidable dispensation. It may be a matter of prudence, but it is not a matter of strict obligation, that the captain should communicate with other officers of the vessel; nor do I find that any particular mode or instrument of punishment has received a particular recognition; that must be left to the common usage practised in such cases, and to the humane discretion of the person who has the right of commanding its application.⁷

To these well-founded remarks, I may add the following observations of the late Lord Chief Justice Tindal,

7 Lord Stowell in the *Agincourt*, 13 July, 1824. 1 Hag. 271.

in a similar case. "By the common law, a similar power of moderate chastisement is given to the captain of a ship, as to a parent and a schoolmaster. Lord Tenterden often observed, that it was always desirable, and, indeed, the duty of the captain, to institute an inquiry, and have the result of it entered on the log. It is his *duty*, because, by availing himself of the advice of others, he prevents himself from acting solely on his own feelings, which may be excited,—and it is his *interest*, because it furnishes evidence in his favour, to be used on the day of trial."⁸

It is unnecessary for me to add anything to these authoritative and well-advised opinions, as to the master's power of punishing, and the exercise of that power, to which you would do well strictly to attend. You will bear in mind, that, by the Mercantile Marine Act, you, as master, must, in the case of punishments inflicted, or proposed punishments, (for fines and forfeitures, or shortening of provisions, are truly punishments,) immediately cause an entry to be made in the official log-book, containing a statement of the offence, and in the case of a conviction, or punishment actually inflicted, a statement of that conviction or punishment, and this entry must be signed by the mate, or, if there is no mate, by the carpenter, boatswain, or one of your crew; and this rule should be applied to all cases of punishments awarded.

I am, &c.

LETTER VII.

How voyage must be pursued—by shortest and safest course—no deviation without necessity—effect of deviation—instances of deviation—of intended deviation—it does not matter how long or short deviation be—or that risk be not increased—or from what subsequent loss arises—necessity only justifies deviation—must be real, inevitable, and imperious—must be conducted in shortest and most expeditious manner—when vessel driven by storm out of course—deviation for necessary repairs—delay in procuring these—to recruit disabled crew, or procure fresh hands—from mutiny of crew—voyage of necessity, how must be pursued—in general, want of water or provisions no justification of deviation—alteration of voyage different from deviation—where particular route prescribed that must be followed—where ports or places specified, they must be taken in that order—when not named must be taken in geographical order—instance of—under such liberty cannot sail backwards and forwards, but must take places in direct and customary course of the voyage—calling must be for some purpose connected with and subservient to main scope of voyage—instances of—though liberty to touch, &c., be most extensive, yet the purpose must be the accomplishment of the principal voyage insured—instances as to—where, from words used, no particular order is to be observed in places of call, these may be taken without regard to geographical order—instances illustrative of.

GENTLEMEN,

Let us now assume that you are fairly out at sea, —the next question is, how are you to pursue the voyage to your port of destination? The general answer is—that—both in regard to the shippers and the insurers, you are bound to proceed to the place of destination by the shortest and safest route, and must not call at any intermediate port, nor voluntarily deviate from the usual and customary course. In your engagement to convey the goods, and in every policy of insurance, whether on the ship, goods, or freight,—it is an understood or implied condition, that the voyage shall be performed in the regular and customary track or course, and that

there shall be no departure or deviation from that track or course, without a justifiable necessity. If, without such a necessity, you deviate from this course, not only are you liable to the shipper for the value of the goods, should these be afterwards lost, but, from the moment of *actual* deviation from that course, the underwriter is discharged from all subsequent responsibility for loss, though the deviation may not have had the most distant connection with the cause of that loss. I may here give you an example or two of voluntary deviation, and of the consequences of that deviation.

A vessel was insured from Carron, in the Frith of Forth, to Hull, with liberty to call at Leith, on her way down the Forth; she did not call at Leith, but called at Morrison's Haven, a small port a little to the eastward; and, after regaining her course, she was lost;—it was held that, from the moment of her deviation, the underwriters were discharged.¹ Another vessel was advertised to sail as a regular trader from Perth to Leith, and from Leith to Perth, (in Scotland);—on one voyage a quantity of malt was shipped at Perth, for Leith, and also some bricks to be delivered at St. Andrew's, a port a little out of the course of the voyage; the vessel went into St. Andrew's to deliver the bricks, where she was detained two days; but, after leaving St. Andrew's, the vessel was lost, with her cargo, on the coast of Fife:—in an action against the owners for the value of the malt, they were found liable.² And, in another case, lime was put on board a barge to be conveyed from the Medway to London, but the master deviated unnecessarily from the proper course, and, *during the deviation*, a tempest was encountered, which wetted the lime, and in consequence the lime took fire, and the whole was lost:—it was held that the owner of the barge was liable for the value of the lime.³

I have said *actual* deviation, because an *intention* merely to deviate, or even previous instructions given to that effect, but not carried into execution, will neither

1 *Wilson v. Elliot*, 26th April, 1776, M. 7096-7; *Browns*, P. C. 459.

2 *Stewart v. Johnson*, 17th January, 1810. F. C. 168.

3 *Davis v. Garrett*; 6 Bing. 706.

charge the owners, nor discharge the underwriters. As where goods were insured on board a vessel from Heligoland to Memel, with liberty to touch at any ports, and to seek, join, and exchange convoy; the vessel sailed from Heligoland, with orders to go to Gottenburgh, which is in the track either to Anholt or Memel;—it was held that the vessel, never having reached Gottenburgh,—the purpose of going there *was merely an intention to deviate*, which did not discharge the underwriters.⁴ In another case, pearl ashes were insured from Liverpool to London,—the master also took in goods at Liverpool, which had to be delivered at Southampton, intending to go there first and deliver the goods, which he did, and afterwards proceeded to London,—during the first part of the voyage, and before the vessel reached the deviating point to Southampton, she had met with bad weather, and had made much water, which damaged the ashes; but on the voyage from Southampton to London, there were no heavy seas, and the weather was tolerably fair:—it was held that the ashes had sustained the damage before the deviation, and for that damage the underwriters were held liable.⁵

From these two cases you will see, that, although a deviation has been intended, yet, if the vessel actually sails on the route of the voyage insured, but previous to the deviating point, damages be sustained, the underwriters are liable. But, without reference to this, if a deviation be actually made, it is a matter of no moment how long or how short a time it may occupy, or for how long or short a distance it may be made,—whether for an hour or a month, for one mile or a hundred,—the underwriters are equally discharged from all responsibility subsequent to such deviation. Should a deviation take place, it will make no difference that, had liberty been given to call at the port or place to which the deviation has been made, neither the risk nor the premium would have been greater; because, it is not the increase of risk, but the substitution of another risk, which puts an end to the insurance. It is only the risk of the voy-

⁴ *Heselton v. Allnutt*, 26th January, 1812; 1 M. S. 46.

⁵ *Hare v. Travis*, 19th June, 1827; 7 B. C. 14.

age insured, in the ordinary and common track, and performed in the regular and usual course, which the insurer undertakes, and any departure from such, unless what has been established by long knowledge and usage, will discharge him from his liability. And it is of no consequence, from what cause a subsequent loss arises,—whether it be or be not an actual consequence of the deviation,—for the insurer is in no case answerable for such a loss, in whatever place it may happen, or to whatever cause it may be attributed, or whether the insured was or was not consenting to the deviation.⁶

But, as the sea is a highway, beset with dangers, and causes may arise which compel a deviation from the ordinary and accustomed course of the voyage, I will now show you, what necessity will justify a deviation,—remarking, generally, that, in order to this justification, the necessity must be *real, inevitable, and imperious*; and, when a deviation is unavoidable, and absolutely necessary, for the safety or preservation of the ship or cargo, or any part of the latter, the deviation must be conducted in the shortest and most expeditious manner.

The first and most obvious cause which will justify or excuse a deviation is, when the vessel is forced by a storm out of the regular course of the voyage, or to take refuge in a port out of that course. But, when such a deviation is thus compelled, you must wait no longer than the necessity requires, and must sail again without delay; although, in this voyage of necessity, the vessel need not return to that point of the original voyage from whence she was driven, but she is entitled to do the best she can, and can take the shortest course to her port of destination.⁷

Another equally obvious cause is, when the vessel has sustained so much damage from storms or stress of weather, that she cannot safely proceed on her voyage without repairs, and, in that case, the master is entitled to go out of the usual course, to the nearest port where these repairs can conveniently be had. But, as this deviation is only justified by the necessity, nothing more must be done than that necessity requires; and only such repairs

6 1 Mar. 184; 2 Park, 619; 1 Arn. 342.

7 2 Park, 638; 1 Arn. 402.

must be given as can be done most expeditiously, so as to enable the vessel to resume and prosecute her voyage.⁸ This necessity, however, will not justify an unnecessary delay in getting these repairs executed, nor authorise a trading at that port, although there seems no objection to taking in goods, as additional ballast, or additional cargo, if no additional delay or risk be thereby occasioned.⁹

Should the officers or crew become disabled, by sickness or any other cause, from properly navigating the vessel, and it would, therefore, be dangerous or impracticable to proceed on the voyage, the vessel can put in to the nearest port where medical assistance can be obtained, or other hands procured.¹ But, if the voyage is one for which, by law, a properly qualified medical man is required to be on board, and there is not one of competent skill, suitably furnished with the necessary medicine chest and medicaments, and with the requisite instruments, it is very doubtful how far such an excuse will justify such a deviation.²

Another cause of deviation may arise from the mutiny of the crew; and when the vessel, through this compulsion, is wilfully carried out of the direct course of her voyage, this deviation will not discharge the underwriters; as, where a ship and cargo were barratrously carried out of her course, by the crew, and the ship and part of her cargo sold, and the remainder sent home by another vessel,—this was held to be a total loss from the time of committing the act of barratry.³

It is the duty of shipmasters to aid and assist ships in distress at sea; not only the common principles of humanity, but also the interest of all persons connected with the sea, concur in encouraging this praiseworthy duty; and, therefore, although a vessel may go out of her regular course for this purpose, it is not considered a deviation.⁴

I need not mention the instances of deviation made

8 2 Park, 636; 1 Arn. 400. 9 1 Mar. 201.

1 1 Mar. 205. 1 Arn. 401.

2 Woolf v. Claggett, 13th December, 1801; 3 Esp. 256.

3 Dixon v. Reid, 25th April, 1822; 5 B. A. 397.

4 1 Mar. 204; 1 Arn. 405.

for the purpose of finding or joining convoy, or with the view to avoid capture or detention, as, at the present time, there is little probability of such taking place; but you may take it as a general rule that, when a deviation necessarily and justifiably takes place, you must pursue this voyage of necessity in the direct course, and in the shortest time and most expeditious manner possible; and there must be no deviation from such a voyage,—because, having become by necessity, and being held in law to be, part of the original voyage, it must, unquestionably, be subject to the same qualifications, and entitled only to the same sort of latitude as that original voyage.⁵ When this justifiable deviation must necessarily be made, from any of the causes now mentioned, you will, of course, enter in your log-book, either at the time, or as soon afterwards as circumstances permit, the causes which render the deviation necessary, and the circumstances attending it, so as that entry, subscribed by yourself, your officers, and some of the crew, may be evidence of the whole particulars attending such deviation. I need scarcely add, that, unless under very particular circumstances, a want of water or provisions will not justify a deviation; as, before sailing, the vessel ought to be fully supplied with water and provisions sufficient for the whole voyage, and, should she so sail without being so supplied, she, unquestionably, is not seaworthy.⁶

But, an *alteration* of the voyage is altogether different from a *deviation from the voyage already commenced*; because a deviation from this line of voyage can only be made after that voyage has actually commenced; but an *alteration* of a voyage previously contracted for, is properly a determination made or resolution come to *before* the voyage intended to be insured can be said to have begun; and, therefore, such an alteration necessarily implies an abandonment of that voyage.⁷ And, therefore, where a certain voyage is insured, but, before the vessel sails on that voyage, the owners or their agent determine, owing to a change of circumstances, to send the vessel on another voyage, and the vessel sails on this new voyage, and is lost in a course common to both voyages,

5 1 Mar. 1991; Arr. 390.

6 1 Arn. 402.

7 1 Arn. 344.

this determination is an abandonment of the voyage insured, and discharges the underwriters, although the letters containing this intelligence of the alteration, and of the loss of the vessel, were received by the owners on the same day.⁸

When the charter-party sketches out a particular route for the voyage, this prescribed route must be pursued, calling only at such intermediate ports or places as may be customary and usual in the course of the voyage, or as may be required by the necessity of the trade in which the vessel is engaged.⁹ If the ports or places at which the vessel is to call or discharge, be specified in the charter-party or policy of insurance, she must call at them, in the same order in which they are so specified, and if they be taken in a different order, this will discharge the underwriters. For example: a vessel was insured from Fisherrow, in the Frith of Forth, to Gottenburgh, and back to Leith and Cockenzie, also in the Forth; on the return, goods were taken in, both for Leith and Cockenzie, and the master put into Cockenzie, which is nearest Gottenburgh, without going to Leith, and there the vessel was stranded and lost. In an action against the underwriters, it was held that, as the intended voyage was described in the policy, and as there was no regular and settled course known to all traders, different from that described, the putting into Cockenzie was a deviation, and the underwriters were consequently discharged.¹

Where, therefore, the ports of call or discharge are named, there is no power of going to them in any order you please, or in that order which you may think shortest, safest, or best; but you must take them in the precise order in which they are named in the charter-party or policy of insurance.² And if the ports of call are not mentioned in the charter-party or policy, but the words are quite general, as—"at any ports or places whatsoever,"—then you can only call at ports and places in the ordinary course of the voyage, for a purpose connected with the

8 *Tasker v. Cunningham*, 7th July, 1819; 1 Ellgh. 87.

9 1 Arn. 351.

1 *Beatson v. Haworth*, 6 T. R. 531.

2 2 Park, 625; 1 Arn. 357.

voyage, and in their geographical order. Thus, goods were insured at and from London to the ship's port of discharge in the Straits of Gibraltar, as high as Messina, with liberty to stop or stay at any ports, and the vessel was freighted with lead from London to Marseilles, and went into Falmouth, where she staid three weeks, and took in tin for the same place. Before she sailed from London, it was the owner's intention that she was to go directly to Genoa, Leghorn, and Naples, and nothing was said about Marseilles: when off that port she could not get in, but went to Genoa, and thence to Leghorn; and, on coming back to Marseilles, was attacked by a privateer, and blown up. In an action on the policy, it was held that, as she did not stop at Marseilles, this was acting contrary to the terms of the policy, for, by her ports of discharge, must be understood the ports at which it was intended goods should be delivered, and the first of these was Marseilles.³

These ports must also be taken in the direct course of the voyage; and, in the ordinary case, after having called at one of these ports or places, it will be a deviation again to call at the same port, or to sail backwards and forwards from one to another. Thus, where a voyage was insured "at and from London to Trinidad and the Spanish Main," with liberty "to call at all or any of the West India Islands or settlements, St. Domingo and Jamaica excepted," it was held, that this liberty of calling must be confined to places taken in the direct and customary course of the voyage, and did not protect the ship, after having once sailed southwards as far as Demerara, in then sailing northwards to Martinique and St. Thomas's, unless very satisfactory evidence were given that this was a customary course in such voyages as that insured.⁴ But such calling will not be deemed a deviation, if it appear, from the broad terms of the policy, that the purposes of the voyage insured, as therein described, requires such a liberty for duly carrying them into effect;—as where goods were insured "at and from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or other

³ *Clason v. Simonds*; 6 T. R. 533. n.

⁴ *Gardner v. Senhouse*; 3 Taunt. 16.

purposes, and to touch and stay at any ports or places whatsoever or wheresoever;"—the ship having touched at Carlshamn in Sweden for orders, and having gone on to Swinemunde, a more distant port, for further orders, and having received orders at Swinemunde, as it was unsafe to load there, to return to Carlshamn, and there wait for orders,—it was held, that the ship might so return to Carlshamn without being guilty of a deviation, it having been found that the vessel went Swinemunde for orders, in prosecution of her voyage, and returned to Carlshamn to obtain further orders as to the ulterior prosecution of the same voyage.⁵

This calling at ports in the course of the voyage, must also be for some purpose connected with, and subservient to, the main scope of the voyage. As, where a vessel was insured at and from London to Berbice, with liberty to touch, trade, and stay at any ports and places whatsoever and wheresoever, in the most extensive terms; the vessel arrived with convoy off Madeira, and began immediately to land goods and load wine in exchange, but, before the wine could be got on board, the convoy sailed; the vessel sailed with several others in the same situation, about a week afterwards, and was captured on her way to Berbice; and, in an action on the policy, it was held, that, notwithstanding the extensive terms of the liberty to touch, &c., these must be construed with reference to the main scope of the voyage, and that, by putting into Madeira, and voluntarily staying behind there, for the purpose of trade, the ship was guilty of a deviation, which discharged the underwriters.⁶ Where also, leave was given in a policy to call at all or any of the Windward and Leeward Islands, on her passage to New York; but the vessel proceeded to two of the Leeward Islands, for a purpose wholly unconnected with the voyage, this was a deviation which rendered the insurance null, notwithstanding the words in the policy.⁷ And, also, where a ship was insured, "at and from Hull to her port or ports of loading in the Baltic or Gulf of

5 *Mellish v. Andrews*, 6th November, 1813; 2 M. S. 27.

6 *Williams v. Shée*; 3 Camp. 469.

7 *Hammond v. Reid*, 17th November, 1820; 4 B. A. 72.

Finland, with liberty to touch or stay at any ports or places whatever for all purposes, particularly at Elsineur, without being deemed a deviation;" the intended port of loading was Pillau, but, before sailing, she took in goods for Elsineur and Dantzic, and stopped on her voyage at both these places to deliver them, and was lost before reaching Pillau;—it was held, that the stopping to deliver the goods, being a purpose wholly foreign to the main object of the voyage insured, was a deviation.⁸

And, though the terms of the liberty to touch, &c., be most extensive, and wide enough to cover intermediate voyages, yet the ultimate object of these intermediate voyages must be, the accomplishment of the purposes of the principal voyage insured, otherwise these intermediate voyages will be a deviation. Thus, a ship was insured, at and from London to New South Wales, and at and from thence, to all ports or places in the East Indies or South America, with liberty to proceed and sail to, touch and stay at, or trade, and sail backwards and forwards, and forwards and backwards, in the most ample terms. After arriving at New South Wales, the master received orders to proceed to the East Indies; but, before this, he had engaged for a voyage to New Zealand, and back to New South Wales, on which voyage he sailed, intending to return to New South Wales, and proceed thence to the East Indies; on the way back from New Zealand, however, the vessel was lost; and, in an action on the policy, it was held that, as New Zealand lay entirely out of the course of the voyage from New South Wales to the East Indies, the sailing thither was a deviation.⁹ Where, also, a vessel was insured at and from Liverpool, to any port or place of loading and trade on the coast of Africa and Islands, during her stay and trade there, with the most extensive liberty to call, &c., and to be employed and used as a tender to any other ship or vessel in the same employ; the vessel arrived at Benin, on the coast of Africa, where she stayed thirteen months, during which she was employed carrying goods from a vessel in the same

⁸ *Solly v. Whitmore*, 26th October, 1831; 5 B. A. 45.

⁹ *Bottomly v. Bovill*, 4th February, 1836; 5 B. C. 210.

employ at the mouth of the river, to Camaroons, and putting them on board another vessel also in the same employ; but, on her return with a homeward cargo, was lost;—it was held that the voyage to the Camaroons was a deviation, and that it was not acting as a tender within the meaning of the policy.¹ And where a vessel was insured on a trading voyage, “at and from St. Vincent, Barbadoes, and all or any other port of the West India Islands, (Jamaica and St. Domingo excepted,) to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back again; during her stay there, and thence back again to Barbadoes, and at any of the West India Islands, (Jamaica and St. Domingo excepted,) until the ship should arrive at her final port as aforesaid; with liberty to the ship in that voyage to proceed to, and touch and stay at any port or places whatever, and to load and unload goods at all places she might call at;”—the vessel arrived at Liverpool, and loaded there a return cargo, consisting partly of coals and bricks, on account of the owners, with which she arrived at Barbadoes; the whole cargo, except the coals and the bricks, was discharged there; and, having taken on board some empty sugar casks, she was ordered to Berbice for a cargo; but was lost in a hurricane, on the night preceding her sailing;—it was held, that, as the cargo had been substantially discharged at Barbadoes, the risk on the ship was at an end at the time of the loss.²

Although, as has been seen, where the ports or places of call are named in the policy, these must be taken in that order, and, when not named, in their geographical order; yet, if it appear from the words used, that no particular order is to be observed in the places of call, then these may be taken without regard to their geographical order. For instance, where a ship was insured on her homeward voyage, “at and from Martinique, and all or any of the West India Islands, to London,” and the ship sailed to take in her cargo at St. Domingo, a place very wide of the direct course from Martinique

¹ *Hamilton v. Sheddan*, M. T. 1837; 3 M. W. 49.

² *Moore v. Taylor*, 16th April, 1834; 1 A. E. 25.

to London,—this was held to be no deviation.³ Where, also, a policy was “at and from Antigua to England, with liberty to touch at all or any of the West India Islands, Jamaica included;”—in order to complete her homeward cargo, the ship put into St. Kitt’s, which lies wide of the direct course from Antigua to London;—it was held, that this was no deviation, for, by including Jamaica, which lies at least 500 miles out of the direct course from Antigua to London, it plainly appeared to be the meaning of the parties, that the islands might be touched at, without regard to their being on or off that direct course.⁴ Where, also, the policy was “at and from Pernambuco, or any other port or ports in the Brazils, to London, beginning the adventure from the termination of the cruize, and preparing for the voyage to London;”—after touching at Pernambuco, and finding she could get no cargo there, the ship sailed to St. Salvador, another port in the Brazils, 500 miles to the southward of Pernambuco, in a direction diametrically opposite to the direct course of a voyage from that place to London; and was lost:—it was held, that the policy attached at Pernambuco, and that the alternative, “port or ports,” gave liberty of going to St. Salvador, without being held a deviation.⁵ And, in another case of insurance of goods, where, after naming certain ports, “all or any” of them, leave was given, generally, “to touch, stay, and trade at, all or any ports or places, whatsoever and wheresoever, in the East Indies, Persia, (the nearest port of which was more than 1000 miles out of the direct course,) or elsewhere;” and the vessel took in part of her cargo at one of the ports named, and proceeded to another port not named, 400 miles to the eastward of the first port, and out of the course, and took in goods there; but she returned to the first port, and sailed for Europe, and was lost;—it was held, that the going to that other port, for the purpose of completing her cargo, was no deviation; and that the goods shipped there were protected by the policy.⁶

³ Bragg v. Anderson; 4 Taunt. 229.

⁴ Metcalfe v. Parry, M. T. 1814; 4 Camp. 123.

⁵ Lambert v. Liddard; 5 Taunt. 480.

⁶ Hunter v. Leathly, 10th May, 1830; 10 B. C. 858; 7 Bing. 317.

From these instances, you will easily perceive, that, although liberty is given in the policy to touch, stay, and trade at certain places, this must be always taken as subordinate, or in some way conducive to the principal object of the voyage; and if a liberty to "call at" be inserted, you are not at liberty to call at the ports or places, otherwise than in the order mentioned; and, if not mentioned, then, they must be taken in their geographical order, unless it appear from the terms of the policy, that that order is not to be observed. Although this liberty has been held to imply, without express words, a liberty to take in goods, provided no delay take place, and no increase or alteration of the risk be thereby occasioned,⁷ yet the master has thereby only liberty to do so at the usual ports, in the usual course of the voyage, and has no power, in consequence of that liberty, to alter the voyage agreed on or insured for, nor can he adopt any intermediate voyage, not having for its object the accomplishment of the original voyage.⁸ Such liberty will not, however, justify any unnecessary delay, which will be held to amount to a deviation; although, under an insurance at and from, the time spent in necessary repairs, before sailing, will not be considered any undue delay.⁹

These may show you the importance of what I mentioned in a former letter,—being furnished with copies of the charter-parties and of the policies of insurance both on ship and goods; and you should bear in mind that, when you are driven to a port out of the ordinary course of the voyage, from any of the causes already noticed, which justify a deviation, you are not to delay longer than the necessity requires, although it seems that, while detained at that port of necessity, there can be no harm in taking in an additional cargo, provided no additional delay or risk be thereby occasioned.

I am, &c.

⁷ *Cormack v. Gladstones*, 16th May, 1809; 11 East. 347.

⁸ 1 Arn. 389. *Bottomley v. Bovill*, *ut sup.*

⁹ *Smith v. Surridge*; 4 Esp. 25.

LETTER VIII.

Storms and tempests—goods thrown overboard—what necessity justifies doing so—what must be done preparatory to throwing over—master ought to act upon his own responsibility—what ought to be done afterwards—ship and cargo must be actually saved—what articles subjects of and liable to general contribution—general rule—goods must be thrown overboard—masts, &c., cut and sacrificed for the purpose of lightening the vessel—and for the good of all—goods laden on deck—consequential damages—damage from stranding—when repairs fall upon owners—when upon general contribution—damage from winds and seas, &c., fall upon owners—loss on goods sold in foreign port—made up by general contribution—contribution must be made on cargo, ship, and freight—mode of valuing for contribution on cargo, ship, and freight—example of mode—master must be acquainted with the mode of making contribution—master must detain goods until average paid—average bond must be executed before goods delivered—shippers or owners liable—mere consignee not—in general average bond must be taken—will foreign adjustment be binding here?—general principle, must be calculated according to law, and usage of port of discharge—when binding in this country—cases on the point.

GENTLEMEN,

We have proceeded thus far without encountering a gale; but I need scarcely say, that every one who proceeds to sea must lay his account with being overtaken by storms,—with being exposed to violent gales and hurricanes,—and with running the risk of sunken rocks and lee shores. These dangers are so common, and the difficulties and responsibilities which may thence arise are so numerous and important, that every ship-master ought to be in the full knowledge of what he can do, and of the powers which the maritime law bestows upon him, when, from these causes, he is placed in a situation of distress, or the ship and cargo are in danger.

I will, in the first place, take the case, that the vessel is in so great danger, in a storm, or from some other inevitable cause, that, for the preservation of her and the cargo, it becomes necessary to throw overboard some part of the latter, for the purpose of lightening the vessel. Here the first question is, under what circumstances can goods be thrown overboard? And the general rule is, that the danger must be imminent,—either from the storm,—from the water that has been shipped,—or from the vessel being driven by a tempest on a rock or shallow,—or from a pirate or enemy pursuing, and on the point of overtaking. But, if the vessel is brought into the state of danger, in consequence of being at first overladen to such an extent, as would prevent her from following the ordinary course of the voyage through a tranquil sea, and goods are thrown overboard in order to lighten her, this is a different matter; and, as I will afterwards show you, the value of the goods so thrown overboard, cannot be made up by the general contribution now to be mentioned. There must be an extreme emergency, arising from a cause beyond the master's control, which will warrant him in throwing overboard a part of the cargo, so as to render that part a subject of general contribution. Assuming, then, the necessity for throwing overboard to exist, must there be anything done preparatory to the goods being actually thrown overboard? The continental codes and writers on the subject have indulged in a great deal of speculation, on the abstract question of the propriety of throwing overboard, and have divided the throwing overboard, into the regular and orderly, or the irregular and disorderly. To any one who knows by experience the hurry and confusion which, in such a moment must prevail, it is laughable to talk of a regular and orderly throwing overboard; for, although there may be something approaching to order, in the midst of disorder, a throwing overboard, in the face of appalling danger, and, for the true cause, must be rapid and irregular, without paying attention to order and forms. And it has been well remarked, that where the throwing overboard has been attended with a scrupulous attention to forms, at the

time of alleged danger, this excites a suspicion rather of fraud, than of honest fear, having led to the overthrow. It is seldom, therefore, that any previous consultation or deliberation can be held, and the master must act on his own responsibility, and on the emergency of the moment, without much regard to the observance of forms. Although it will be proper to throw over the heaviest and most cumbersome articles. in the first instance, when these can be readily come at, yet, this being done, will be no proof of the necessity or of the propriety of the act ; nor can this selection be expected to be made, where, as in the general case, in the hurry and alarm of the moment, every hand is hastening to throw overboard whatever comes within its reach, without regard to order or rule. But, although the time of danger be thus a time of hurry and confusion, which sets all rules and forms at defiance, yet it is a rule, which can be followed in all cases, and which is required in all countries, that, in the first moment of tranquillity, the master shall cause the whole circumstances which led to, and which attended the overthrow, and as particular a specification as possible, of the goods thrown overboard, to be entered in the log-book, and subscribed by himself, his officers, and some part of the crew ; and that, on the ship's arrival at the first port, these entries be verified by the oaths of the parties subscribing, so as to remove any suspicions that may attend the circumstances of the overthrow, and prevent any opportunity of purloining any part of the goods, under pretence that they were thrown overboard.

I have already mentioned that, where goods are thus thrown overboard, for the preservation of the ship and cargo, and in order to lighten the ship, the value of these goods must be made up by contribution ; but, in consequence, the ship and cargo must be actually saved ; for, if they should be lost after the overthrow, in the same storm, there can be no contribution, because the object for which the overthrow was made was not attained, and there is nothing upon which a contribution can be levied. If, however, the vessel outlive that storm, and is lost in a subsequent part of the voyage, but part of the cargo

is saved, that part must contribute to the loss by the former overthrow, as it is to be presumed that their safety is owing to that former overthrow. Or, if the vessel is driven by a storm, to take refuge in a strange port, to which she was not destined, and which, in consequence of her draught she cannot enter, and, in order to lighten her, part of the goods is put into lighters or boats, but are lost in the way to the shore,—the value of these goods must be made up by a general contribution,—because they were taken out of the vessel for the sake of lightening her, and for the general benefit. But if, on the other hand, the goods in the lighters are landed safe, and the vessel and the remaining cargo on board are lost,—the goods in the lighters, so landed, cannot contribute to the loss of the ship and the rest, because their safety can in no ways be attributed to that loss, nor was their safety the cause of the loss.

It is of importance for you to know, what articles are the subjects of a general contribution, because you will often have to settle or arrange this in the absence of your owners. The general contribution is, what is known by the name of general average, and many excellent works have been written on this subject by lawyers and others, both in this and foreign countries. I shall endeavour to simplify it as much as possible.

It is an old rule of maritime law, that the value of what is sacrificed for the benefit of all, must be made good by a contribution upon all. In this, there are three ingredients:—the goods, for instance, must be *thrown* overboard; the masts, sails, or cables must be *cut* and *sacrificed*. If, therefore, the goods are washed out of the vessel by force of the waves, or destroyed on board by lightning, or other causes, the loss falls upon the merchant. If the vessel is dismasted, and the rigging cut away, or if the sails are torn to shreds in a storm, or the master cuts his cable, in place of slipping, and afterwards recovering it, the loss falls upon the owner. In order to render any subject, matter of general contribution, there must be the act and agency of man,—the deliberate purpose of sacrificing the subject for the general benefit.

Another ingredient is, that the sacrifice must be made *for the purpose of lightening the vessel*. If, therefore, goods are thrown overboard without any adequate cause, or by the whim or caprice of the passengers or crew, there can be no general contribution for these, although the merchant loser may have a claim against the persons who thus wantonly threw them overboard, or against the master or owners, for the value of these. If, also, any part of the vessel be damaged, merely from the wind and weather, or in a storm, the loss falls upon the owners alone, and is included under the obligation to keep the vessel tight, staunch, and strong during the voyage,—there has been no sacrifice of a part for the good of the whole.

The last ingredient is, that the sacrifice must be made *for the good of all*. This is the principle on which contribution is made upon all; and, therefore, if the goods were thrown overboard, merely because the vessel was too heavily laden for the voyage, this may have arisen from the fault of the shipper or master, but there has been no sacrifice for the common good. So also, where the master has been arrested in a foreign port, for the expense of repairs and sound dues, and to procure his liberation, he sells part of the cargo, this is not a subject for a general contribution;¹ and where, in consequence of springing a leak, a vessel is obliged to put into a port to repair, the expenses of these repairs are not a general average;² nor, where the vessel, by carrying a press of sail to escape from a privateer, suffers material damage, is this general average;³ nor, where a vessel's masts and rigging are damaged, and she herself considerably strained, in consequence of carrying a press of sail to avoid being run on shore, is this a general average.⁴

It is the general practice of this country, as well as established law in many continental states, that where goods have been loaded on deck, and these are thrown overboard, they have not the benefit of a general contri-

¹ Dobson v. Wilson; 3 Camp. 486.

² Jackson v. Charnock; 8 T. R. 209.

³ Covington v. Roberts; 2 B. P. N. R. 378.

⁴ Power v. Whitmore; 4 M. S. 141.

bution, unless they have been so carried according to the general usage of a particular trade; but, if they are saved, they are liable to this general contribution. Whatever may have been the reasons upon which this rule has been established, it is now common in practice, and is necessary to be attended to in ascertaining the loss by throwing overboard, as well as the property bound to contribute to that loss. It is altogether a different question, how far you and your owners are responsible to the owners of the goods, laden on deck and thrown overboard, for the value of the goods, and the consideration of that responsibility will properly fall under a subsequent letter.

Not only is it the rule, that the direct loss sustained by throwing part of the goods overboard, or sacrificing any part of the vessel, for the general good, must be made up by a general contribution, but there may be also consequential damages, as they may be called, which have also the benefit of this contribution; as, where, in order the more readily to effect the throwing overboard, part of the deck or sides of the vessel are cut away, or if, in consequence of the overthrow, other parts of the goods are broken, destroyed or damaged, the value of these must also form part of the general contribution. Where it is necessary, to prevent the vessel being cast away in a storm, to cut the cable, or make other sacrifice of her tackle and furniture, the loss of these is also made up by general contribution; but this sacrifice must be carefully distinguished from the loss of a mast, sails, or tackle, on a lee shore, or from the unnecessarily cutting of a cable, when it could have been slipped, and afterwards recovered. Similar losses incurred to prevent the vessel from running on shore, or upon rocks, or from being run foul of by other vessels, or for getting clear when run foul of, must be made up by a general contribution; and where sails, ropes, and other materials are cut up, and used at sea, for the purpose of stopping a leak, erecting a jury mast, &c., the value of these also falls under the general contribution.

I will, in the next letter, advert more particularly to

what is legally held to be a stranding; but, in reference to the subject of general contribution, I would here observe, that it is not every stranding, or running upon a rock or shallow, which makes the damage occasioned to be sustained by a general contribution. If, by any of the perils of the sea, the vessel be stranded, or forced upon a rock or shallow, and damage be thereby done to the vessel, that damage will fall upon the vessel alone, as having arisen from a danger incident to the voyage. But, if the master, knowingly and advisedly, when in danger from a storm, or for the express purpose of avoiding a greater danger, run his vessel aground, or on a rock or shallow, and she be afterwards got off, the damage which may be done by so doing, and the expense of getting her off, including the expense of lightening her, or the value of goods thrown overboard, to enable her to float and continue her voyage, are proper subjects for average contribution. It is rather a difficult and an intricate question, whether, if, in consequence of the vessel being run aground or stranded, the cargo is saved but the vessel is lost, the cargo saved should contribute to the value of the vessel? This is a question beset with difficulties. No case has occurred in this country, in which any decision has been given on it, or approaching to it; although the great majority of foreign authorities are against the opinion, that the subsequent loss of the vessel should be a subject of general contribution. Every instance must depend so much upon its own peculiar circumstances, that it seems almost in vain to give any general rule, applicable to all cases, although, it will be proper to keep this general principle in view, that the vessel must have been deliberately and intentionally sacrificed for the general benefit of all.

Generally speaking, the expenses of repairing injuries which the vessel may have received in a storm, fall upon the owners; but, where the vessel cannot prosecute her voyage without repairs, and where the injuries would not have been sustained had the cargo not been on board, and where the repairs are not to be of a lasting benefit to the vessel, the expense of so much of the

repairs as were absolutely necessary for enabling the vessel to perform the voyage, must be made good by a general average.⁵ And, in the same way, must be borne the expense of going into port for the repairs, the necessary expense of unloading, warehousing, and reloading the cargo, or of men employed in keeping the damaged ship free from water, in order that the cargo might not be damaged. If the injury itself be the subject of general contribution, the port charges and the wages and provisions of the crew, during the time of the necessary repairs, will also be the subject of a general contribution;⁶ but if the injury has been occasioned by the perils of the sea, neither pilotage nor the wages and provisions of the crew will fall under the general contribution.⁷

Thus, damage sustained by the vessel in consequence of high winds and heavy seas, the expenses incurred for pilotage, in putting into port to repair these, and in paying and maintaining the master and mariners, and in raising money for that purpose, are not properly subjects of general contribution.⁸ Nor, where the vessel springs a leak, and puts into a port to repair, are the expenses of the repair, or the maintenance of the crew, and other necessary charges attending that repair, to be borne by a general contribution.⁹ And where, in effecting her escape from a privateer, in a heavy gale, and the sea running high, the vessel carries a press of sail, by which she is much strained, and her seams are opened, and the head of her mast carried away,—these are not subjects for a general contribution.¹

The circumstances of necessity which will warrant a shipmaster in disposing of part of the cargo in a foreign port, will be the subject of a subsequent letter; when he does so for the benefit of all, the goods thus sold for the general benefit, are also to be made good by a general contribution.

You have thus seen what degree of danger will justify

⁵ *Plummer v. Wildman*; 3 M. S. 482.

⁶ 2 Arn. 904.

⁷ *Ibid.* 906.

⁸ *Power v. Whitmore*; 4 M. S. 141.

⁹ *Jackson, ut sup.*

¹ *Covington, ut sup.*

you in throwing overboard part of the goods, or sacrificing part of the vessel, for the general safety, and what subjects are to be made good by a general contribution upon all; and I now proceed to show you, upon what subjects that contribution is to be made.

That contribution is to be on the cargo, the ship, and the freight.

As to the cargo,—the general rule is, that all merchandise conveyed in the ship, for the purpose of traffic, whether belonging to merchants, to passengers, to the crew, or to the master, of whatever kind, and however small the weight, in comparison of the value, must contribute, whether these are to be carried freight free or not. The goods thrown overboard, and, as I have already said, goods carried on deck, if saved, must contribute. But the persons of neither passengers nor crew contribute for their personal safety; and in this country, the wearing apparel, jewels, and other personal property of the passengers, do not contribute.

The ship contributes to every general contribution, with the exception of her ammunition, provisions, and stores; and the freight and earnings of the voyage contribute, according to their clear amount, after deducting the wages of the crew and the other necessary expenses of the voyage, so that the wages of the seamen do not contribute.

As the settling of a general contribution is a duty generally devolved upon the master, and, at all events, is a duty which he ought to be able to perform, it will be necessary, in the next place, to make you acquainted with the manner in which these subjects are to be valued for that contribution.

The cargo saved is, in general, to be taken at the clear, actual net value, at the port of destination, after deducting the charges attaching to it, such as freight, duties, and landing charges; but neither the premium of insurance, nor the commission on the sales. If the vessel has put back to the port of loading, the goods are to be taken at the invoice price, and shipping charges; and the same rules are to be applied for estimating the value of

that part of the cargo which was thrown overboard. Should the vessel have been compelled to put into a port short of her destination, and she herself be so much injured as to be unable to proceed, and if no other vessel or means can be found for forwarding the cargo saved, in consequence of which they have to be sold at that intermediate port,—the sum to be taken as the value of the goods is the actual sum which they have brought at that port, less all the charges of sale.

If the goods saved have been damaged, and are sold in that damaged state, the same rule is applied to ascertain their value, viz.,—the proceeds of the sale, less the expenses; and, if the goods saved have been thought not worth the freight, and have, therefore, been abandoned to the master for the freight,—or, if the freight and charges upon the goods exceed the sum which they bring when sold,—or, if the goods have been so much damaged as to be worth nothing,—then, there can be no contribution from the cargo.

In ascertaining the value of the vessel for the contribution, the tear and wear during the voyage, and the provisions and stores, and any particular average losses have first to be deducted; then, the value of the vessel must be taken, as at the termination of the voyage, or her value may be taken at the commencement, without deducting the tear and wear of the voyage.

The freight is to be taken at the actual sum received by the owner at the termination of the voyage, deducting the seamen's wages, and one-third for petty averages. The freight for the goods thrown overboard is paid by the general contribution, and must also be included; but, if goods for these have been taken in at any intermediate port, the freight of these goods must be deducted from it.

The sum total, upon which the contribution is to be made, is the amount of all these valuations, so ascertained; and each person's share of the loss is, that proportion, according to the value of his property, which the whole loss bears to the value of the cargo, ship, and freight. I give you an example of the mode of contribution, from a work of great authority:—

<i>Amount of Losses.</i>		<i>Value of Articles to Contribute.</i>	
Goods of A. thrown overboard	£500	Goods of A. cast overboard ..	£500
Damage of the goods of B. by the jettison	200	Sound value of the goods of B., deducting freight & charges	1000
Freight of the goods thrown overboard	100	Goods of C.	500
Price of new cable, anchor, and mast	£300	Goods of D.	2000
Deduct one third	100	Goods of E.	5000
	200	Value of ship	2000
Expense of bringing the ship off the sands	50	Clear freight, deducting wages, provisions, &c.	800
Pilotage and port duties, going into the harbour and out, and commission to the agent who made the disbursements	100	Total of contributing value	£11,800
Expenses there	25		
Adjusting this average	4		
Postages	1		
Total of losses....	£1180		

Then, (as) £11,800 (is to) £1180 (so is) £100 (to) £10.

That is, each person will lose 10 per cent. upon the value of his interest in the cargo, ship, and freight.

Therefore A. loses	£50
B.	100
C.	50
D.	200
E.	500
The owners.	280

£1180 which is the exact amount of the losses.

Upon this calculation, the owners are to lose £280, but they are to receive from the contribution £380, to make good their disbursements, and £100 more for the freight of the goods thrown overboard, or £480, minus (less) £280. They, therefore, are actually to receive £200

A. is to contribute £50, but has lost £500, therefore A. is to receive 450

B. is to contribute £110, but has lost £200, therefore B. is to receive 100

Total to be actually received..... £750

On the other hand, C., D., and E. have lost nothing, and are to pay as before, viz.—

C.	£50
D.	100
E.	500

Total to be actually paid.. £750

which is exactly equal to the total to be actually received, and must be paid by and to each person, in rateable proportion, to be ascertained by another calculation, with which it is unnecessary to trouble the reader.*

* Mr. Stevens, in his *Essay on Average*, is of opinion that the value of the provisions should be deducted, not from the freight, but from the original value of the ship.—Page 63.

Although it is a common practice to put all the papers, documents, and vouchers into the hands of a professional person, called an average-stater, whose peculiar business it is to adjust losses, for the purpose of settling this average contribution,—and sometimes this is left to the broker,—yet it is highly proper that you should be quite conversant and well acquainted both with the mode in which this contribution is to be adjusted and settled, and with the practice of doing so; because many cases may happen, in which you cannot have the assistance of such persons; and, in all cases, it is absolutely necessary that you should have a thorough knowledge both of the principle upon which this contribution is made, and of the practice of actually calculating the contribution, and of adjusting it among the different parties interested, according to the amount of the interest of each. I hope the above example will make both quite plain and easy, and, with the assistance of your common sense, may, in almost any circumstances, make the settlement of the loss, and the adjustment of the contributions to be paid or received by the parties concerned, a matter of mere calculation.

By the maritime law, you have the power of retaining the goods of the different shippers, until the average contributions be settled and paid; but, were this power to be actually exercised, it would be the cause of general inconvenience, and even loss; and, indeed, where the price which the goods may bring in a foreign market, has to be taken as their value, you must at once see that this right cannot be enforced. It is the common practice, therefore, for all the parties to enter into an agreement, called an average bond, narrating the particulars of the loss, and the sacrifices made, and expenses incurred for the common benefit;—that the loss, damages, and expenses, when properly ascertained, may form a charge upon the ship, cargo, and freight; and, therefore, each party binds himself, severally, to pay the master, or owners, or their agent, his proportion or share of the general contribution, for the loss and expense, and of all legal charges, salvage, and expenses to which he may be liable. The same agreement, or bond, usually

contains a reference to some person named in it, to ascertain the amount of the loss, and to adjust and apportion the different proportions or shares of the contribution which each party has to pay. It is your duty, therefore, to procure this bond, duly executed by all the parties, before you part with the possession of the goods, because you have a lien upon the goods, or, in other words, you are entitled, as already mentioned, to retain them, until each party settles for any average contribution; and, by delivering the goods, or landing them for delivery, you lose this lien, or right of retention. The average bond is considered, in practice, as an equivalent for this lien, and enables you to maintain an action, when necessary, against any or all of the individuals, for their respective proportions of the contribution.

The general rule is, that the shippers or owners of the goods are liable for the contribution falling upon the goods of each, and a consignee, where he is owner, is also liable. But a consignee, who is a consignee only, does not render himself liable for this contribution, merely by receiving the goods under a bill of lading, where it is not made an express condition of the bill of lading, that, by taking the goods under it, he shall be liable for the share of the contribution falling upon the particular goods mentioned.² A condition of this kind is not, however, for common, inserted in bills of lading, although it may be prudent, generally, to do so; but you can easily prevent any trouble or dispute upon this head, by retaining possession of the goods, until each consignee actually subscribe the average bond, where there is one, or, if not, until each give you an obligation, binding himself to pay the proportion of the average contribution effeiring to the goods consigned to him. In this way, either under the average bond, or under the separate obligation, you can recover the proportion even from the mere consignee; but, although you have taken neither, and have delivered the goods to the consignee, the actual owner is, notwithstanding, liable for his proportion of the loss, and that proportion can be recovered by an

² *Scaife v. Tobin*, 4th May, 1832; 3 B. Ad. 523.

action against him. But, in the case of a general ship, it is absolutely necessary, in order to avoid the necessity and expense of recovering from each individual merchant, that a regular average bond be executed by all the shippers, before any of the goods be delivered; and, when that bond also names the individual who is to ascertain the amount, and adjust the proportion of the average contribution, his average state fixes the share which each is bound to pay under the bond.

A doubt may very naturally here occur to you, whether, when an adjustment has been made in a foreign country, perhaps on a principle different from that recognised in this country, such an adjustment will be binding upon the shippers and underwriters here. It is a principle established in the courts in this country, that a general average is to be calculated, between the owners of the ship and the owners of the goods, according to the law of the port of discharge.³ If both parties belong to this country, neither can complain of the adjustment being made according to the laws of this country, but where the goods belong to parties of the nation where the vessel arrives, the adjustment must be made according to the laws of the port of discharge, and they cannot complain of that adjustment being made according to the authority of their own laws. Any other rule would, as was remarked by the late Lord Tenterden, in the case now referred to, be attended with great confusion, perplexity, and irregularity, even if it should be found practicable, which, in many cases, it would not be. An adjustment so made, according to the laws and usage of the port of discharge, must be binding on all the parties concerned; but, when an adjustment so made comes to be founded on in this country, it must distinctly appear, that it was made according to the law and practice of that port; and this must not be left to be collected, merely as a matter of inference, from the proceedings under which that adjustment was made. I will detail to you the cases, in which this question has been agitated in this country.

In the case alluded to, the average contribution had

³ *Simonds v. White*, 31st May, 1824; 2 B. C. 805.

been settled at the port of the vessel's discharge in Russia, although it was settled on a different principle from what it would have been in this country, and the merchant had, in order to obtain his goods, been obliged to pay a sum towards the expenses, to which he would not have been liable by our laws; but, as it was proved, that the average had been adjusted and settled according to the law of the country of the port of discharge, the merchant could not recover back from the master the sum so paid, although both the parties were British subjects, and the vessel a British vessel.⁴ And in another case of Russian adjustment, where the contribution was for wages and provisions during a refitment which, in this country, would not have been general average, and, having been paid by the owner of the goods, he brought an action against the shipowner to recover the sum so paid; but the same decision was given as in the preceding case.⁵ But in another case, in which an average contribution had been adjusted and settled in Portugal, a merchant paid his contribution, and brought an action for the sum so paid against the underwriters in this country;—it was found, that he could not recover, because it was not proved, that the adjustment had been made, according to the known law and usage of that foreign country.⁶

In another case, a general contribution had been adjusted and settled, according to the law of Denmark, and the holder of a respondentia bond (that is, a bond for money lent upon the security of the goods,) had paid his proportion to that general contribution;—it was held, that he could recover from an English underwriter the sum so paid, on his proving that such a security was liable to contribute by the laws of that country.⁷ And, in another case, the general contribution had been adjusted and settled at Pisa, contrary to the English law, and, under that adjustment, an insured upon goods had to pay a larger share of contribution than, by the law of England, could be demanded; but, on the insured

⁴ *Simonds, ut sup*

⁵ *Dagleish v. Davidson*; 5 D. R. 6.

⁶ *Power v. Whitmore*, 1815; 4 M. S. 141.

⁷ *Walpole v. Ewer*, 1789; 2 Mar. 767. *Newman v. Gazalet*; 2 Park, 900.

proving that it was the usage, in adjusting losses, to allow the whole of such contributions, he was found entitled to recover that sum under an English policy.

Where, then, an average contribution has been adjusted and settled at a foreign port, these cases will show the necessity, for preserving distinct evidence that it was so adjusted and settled according to the law and practice of that country, in case the terms of that adjustment may be afterwards called in question.

I am, &c.

LETTER IX.

Stranding—what is the legal meaning of the term in insurance?—instances in which accident held to be stranding—instances in which such accident held not to amount to stranding—these in questions with underwriters—distinction in such cases, of what is and what is not a stranding—meaning of the expression in the memorandum “unless ship be stranded”—underwriters not liable for partial losses unless she be stranded—but if stranded, underwriters liable for all losses, even happening from other causes—though not if *before* stranding—these strandings not matter of general average—when damage must be made up by general contribution for a stranding—what are the distinctive characters of such a stranding—it must be for general preservation—stranding by peril of the sea, by negligence, &c., not such a stranding—this stranding must be a voluntary and an intentional stranding—example—general rule as to this kind of stranding—whether if, in consequence of stranding vessel be lost, this loss is subject of general contribution—advice to shipmasters.

GENTLEMEN,

I now proceed to the subject of stranding, as to which a considerable diversity of opinion prevails, both practically and legally, as to what constitutes a stranding; and in many cases a different opinion has been come to, on a minute distinction of circumstances. It will be proper to state—what is considered in law to be the meaning of the word “stranding;” then to detail some decisions, in which the accident has been held to be a stranding; and afterwards mention some other decisions, in which it has been held that the accident did not amount to stranding.

In order to constitute a proper stranding, then, in the legal acceptation of the term, it is held, that it must be where the vessel takes the ground, under some extraordinary circumstances of time and place, from accident,

or by reason of some unusual occurrence, and out of the ordinary course of the navigation; but, where the event happens, of the vessel taking the ground in the ordinary and usual course of the navigation,—as, for instance, from the common ebbing and flowing of the tide,—or in a tide harbour, from the natural deficiency of water, and she will again float upon the flow of the tide,—this is not to be considered a stranding.¹ When, therefore, by an unforeseen accident, not in the ordinary course of the navigation, or by the force of the wind and waves, she strikes the ground, or runs aground, this, in the ordinary case, is a stranding, although it is not every striking the ground, or running aground, that will be held to constitute a stranding. And, accordingly, let us now see, what cases have been held to amount to stranding.

In one case, the vessel was in her course up the Mersey to Liverpool, and the pilot, in the absence of the master, and contrary to his caution against letting the vessel take the ground, laid her aground upon a bank in the Mersey; when she floated, he took her into the pier of the basin, and made her fast there, with the intention that she would take the ground when the tide fell; soon afterwards, she took the ground astern, and, the water leaving her, she fell over on the side farthest from the pier, with such violence as broke many of her timbers, though, when the tide rose, she righted, but with ten feet water in the hold, by which the cargo was wetted and damaged;—this was held to be clearly a stranding, because the vessel was both taken out of the usual course, and moored contrary to the usual way, and contrary to the master's orders.²

In another case, it became necessary, in the course of an inland navigation, to draw off the water, in order to repair the navigation, and a ship, then in that navigation, had to be placed in the most secure situation that could be found; but, when the water was drawn off, she went, by accident, upon some piles which were not previously

1 Per Tenterden, C. J., and Taunton, J., in *Wells v. Hopwood*; H. T. 1832; 3 B. Ad. 34.

2 *Carruthers v. Sydebotham*, 25th April, 1815; 4 M. S. § 77.

known to be there ;—this was held to be a stranding,—the accident having happened not in the ordinary course of such navigation.³ Where, also, a vessel was compelled, by tempestuous weather, to take refuge in a tide-harbour, where she was moored alongside a quay in the usual place for vessels of her burden ; in addition to the usual moorings, it became necessary to fasten her by tacklings from the masts, to posts on the shore, so as to prevent her from falling on her side when the tide left ; but the rope by which she was so fastened not being of sufficient strength, broke when the tide went out, and she fell over on her side,—was stove in,—and greatly injured ;—this was held to be a stranding.⁴

In one case, a vessel had been forced into Holyhead by a storm ; and, in entering the harbour, she struck on a sunk anchor, by which she sprung a leak, and was in danger of sinking, and she had, on that account, to be warped up the harbour, where she took the ground, and remained fast there, for about half an hour ;—this was held to be a stranding.⁵ And, in another case, a vessel had arrived at Hull, which was a tide-harbour, and was proceeding to discharge her cargo, on a quay at the side of it, which could only be done at high water, and the cargo could not be discharged in one tide ; the vessel was moored by a rope from her head, to a post, and, on the first ebb, she grounded in safety on soft mud ; but, on a subsequent ebb, the rope by which she was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, as it was intended she should do,—but her forepart got on a bank of stones, rubbish, and sand, near the quay, by which she was strained, and admitted water, so as to damage the cargo ;—although no lasting injury was sustained by the vessel, yet this was held to be a stranding.⁶

Then, let us next see, what cases have been held as not amounting to a stranding ; and, here, you will require

3 *Rayner v. Goodmand*, 7th November, 1821 ; 3 B. A. 225.

4 *Bishop v. Pentland*, T. T. 1827 ; 7 B. C. 219.

5 *Barrow v. Bell*, 22nd November, 1825 ; 4 B. C. 736.

6 *Wells v. Hopwood*, *ut sup.*

carefully to mark the distinction between, what has been held to be a stranding, and what has been held not to be a stranding. Thus, where a vessel struck a rock, and remained on it about a minute and a half after striking,—this was held not to be a settlement of the vessel, for a sufficient length of time, to constitute a stranding,—the striking being nothing more than a “touch and go.”⁷ Again, where a vessel, in the course of her progress up a tide-harbour, with a pilot on board, took the ground, and so remained for eight hours; next day she again took the ground; and a third time, when about to discharge her cargo, and she then lay on her broadside for two whole tides, and thereby the cargo was damaged;—this was held not to be a stranding, but only what would happen in the ordinary course of navigation in that tide-harbour.⁸ And, in another case, a vessel had entered the port of Dunkirk, a tide-harbour, and was lying in a place pointed out by the harbour-master; and, upon the ebbing of the tide, she took the ground, in the place where it was intended she should; but, in doing so, she struck upon some hard substance, by which two holes were made in her bottom, and the cargo was damaged;—this was held not to be stranding,—the vessel having taken the ground merely through the ebbing of the tide, and in the very place where it was intended she should.⁹

All these cases, you will observe, were questions with the underwriters, and not as to damage which has to be made good by a general contribution on ship, cargo, and freight,—to this I will come by and bye. But here, you will attend, that the great distinction, in cases of stranding of the kind now noticed is, that, if the event happen in the ordinary course of navigation,—as from the regular flux and reflux of the tide,—without any external force or violence, it is not a stranding; but, if the vessel takes the ground, out of the usual course of the navigation, and from any extraordinary circumstance of time and place, it is held to be a stranding; and when that

7 *M'Dougle v. Roy. Ex. Assur. Co.*; 4 M. S. 503.

8 *Hearne v. Edmunds*, 1819; 1 B. B. 338.

9 *Kingsford v. Marshall*, E. T., 1832; 8 Bing. 458.

is the case, it is a matter of no moment though the accident should have been occasioned by the neglect, rashness, or carelessness of the pilot, or through the negligence of the crew.

These instances of stranding now given, refer to the policy of insurance, in the memorandum at the bottom of which, you will observe, that there are certain kinds of articles enumerated, upon which the underwriters are to be free from all losses under a certain per cent., and certain other articles, upon which they are to be free from all losses, unless or except that loss be of the nature of a general average, or the vessel be stranded. The cases now given apply to a stranding under this memorandum; and, therefore, under it, the underwriters are not liable for any partial loss upon the articles enumerated, when that loss is excluded by the memorandum, unless it be of the nature of a general average, or happens after the vessels being stranded. But, if there have been two or three partial losses, on any of the enumerated articles, each of which is individually below the specified per cent., these losses can be added together, so as to make up that per cent. or more.¹ Although, however, the article is so much damaged as not to be worth the freight, yet, if the cause of damage does not constitute a general average, or if there has been no stranding, and the article specifically remains in existence, the underwriters are not liable, when it is one of the enumerated articles, upon which, as stated in the policy, they are not liable for an average loss, unless it be general, or the ship be stranded. But, where the vessel has been stranded, and a loss sustained in the course of, or subsequent to, that stranding, this takes away the exception, and the articles enumerated in the memorandum are placed in the same situation as any other goods, so that the underwriters become liable for all damage or partial losses sustained by these, though that damage, or these losses may not arise from the stranding, but from some other subsequent cause.² Should the goods, however, have sustained damage, or

1 *Blackett v. Roy, Ex. Assur. Co., H. T. 1832; 2 Tyrwh. 266.*

2 1 Mar., c. 7, § 3.

should the loss have happened *before* the vessel is stranded, the subsequent stranding will not satisfy the condition in the memorandum, so as to open up the exception. For instance, hides (one of the enumerated articles) were insured from Valparaiso to Bourdeaux, free of particular average, unless the ship be stranded; the vessel arrived at Rio Janeiro, in the course of the voyage, with the hides in a state of incipient putridity, in consequence of a leak in the vessel, and they were sold at Rio for about one-fourth of their value; subsequently, the vessel was stranded on her way to Bourdeaux, at the entrance of the river Garonne, in France; and an action having been brought under the policy, for a loss by stranding,—it was held, that the stranding was not such as to make the underwriters liable for an average loss.³

The strandings, of which I have been speaking, and have given you examples, are not the same as that stranding, the damage occasioned by which has to be made good by a general contribution on ship, cargo, and freight. It can never be said that a stranding, in the former sense, is for the common good, the loss by which has to be made up by a contribution on all; for where the stranding has been occasioned by the perils of the sea,—as by the force of the winds and waves, or by the vessel striking on a rock,—the damage thereby sustained cannot be said to have been voluntarily incurred for the preservation of all. The same reason holds, when the stranding has been caused through the negligence or rashness, or even carelessness or ignorance of a pilot; nor, though the stranding may have been in consequence of the negligence or mismanagement of the crew, or of the mismanagement or ignorance of the master or any other person, in charge of or employed about the vessel, can that stranding be held to have been voluntarily done for the preservation of all. In none of the cases referred to, was the damage occasioned by the stranding, sustained for the common good; but that damage was done by an accident, which, had the master foreseen, he would, as a prudent man, have done all in

3 *Roux v. Salvador*, 21st January, 1835; 1 Bing. N. C. 520.

his power to avoid or prevent. The stranding of which I have been speaking, must have been caused by *accident out of the usual and ordinary course of navigation*; but I come now to treat of another kind of stranding, *which is effected by man* for the preservation of all. The one stranding is altogether *involuntary*; the other is *voluntary*; the one is an *accident*, the other must *not* be an accident. The latter stranding must be a loss incurred, or a sacrifice made, for the general preservation of all, which has to be made up by a contribution upon all; and, therefore, to entitle a loss by this stranding to be borne by a general contribution, that stranding must have been voluntarily sustained, for the common good of the cargo and the ship. In the former kind of stranding, the mind and agency of man were not concerned, or rather, that mind and agency were not exerted in duly managing the vessel, or, if exerted at all, were exerted to avoid the stranding;—in the latter kind, that mind and agency must be exerted in intentionally bringing about the stranding. The vessel must have been deliberately and intentionally stranded—that is, run upon a rock, shallow, or strand—for the *preservation of all*. There must have been a sacrifice for the common good, and that sacrifice must have been made intentionally for this purpose; and the stranding must not be the result of the ordinary perils of the sea. In such a case, and in such only, does the damage sustained by this voluntary stranding, either by the ship or cargo—the expense of unloading and reloading the cargo when necessary—and the value of any goods thrown overboard, for the purpose of lightening her, and enabling her to float off the place on which she has been stranded, and so continue her voyage for the benefit of all concerned—form properly the subjects of a general average contribution, to be borne by all. In the previous instances of stranding, the damage sustained by the ship or cargo must fall upon the respective owners of each, unless when it can be claimed from the underwriters on either, as a particular average; but, the last-mentioned stranding having been done for the preservation of all,—the loss and damage thereby sustained, and the expenses

consequently incurred, must be made good by a contribution upon all.⁴ It is absolutely necessary that you should rightly understand what is, and what is not, a voluntary stranding, in the proper sense of that term,—for, here, misapprehension may lead your owners into serious disputes and unnecessary expenses. I will give you an instance from a practical writer on marine insurance, which forcibly illustrates this distinction.

A vessel on her voyage from London to Hamburgh, was driven by a high tide on a piece of ground very near the latter port; the cargo was unladen, not for the purpose of lightening the vessel so as to set her afloat, but in order to be delivered to the consignees; and the vessel was subsequently dug out;—there, the vessel could not be called on to contribute to the expense of the unloading, although, by being lightened, she was incidentally benefitted from the unloading;—neither could the owner of the cargo be called on to contribute to the expense of digging out the vessel, because that was done for her individual benefit; and the cargo having been safely delivered to the consignees, it was a matter of no moment to them whether the vessel floated or not. In this case, then, the damage which the vessel sustained, was not the consequence of a voluntary sacrifice on her part,—the expenses of unloading the cargo were for no common object,—and, therefore, both the damage and expense fell upon the respective owners of the ship and cargo, for whose respective benefits these were incurred, and there was nothing of the nature of a general average.⁵

The general rule, as stated in a work of great authority, seems to be, that, if the stranding be voluntary, that is, if it be done deliberately and intentionally, to save the ship and cargo, the consequent damage sustained by the ship and cargo, becomes the subject of a general average, which must be borne by a general contribution upon all. But, if the stranding be involuntary, that is, if it happen from accident, by a peril of the sea, or any other similar cause, though the ship or cargo be damaged, nothing has been advisedly sacrificed for the

4 2 Arn. 881-5. 5 Benecke, 215.

benefit of all, and, therefore, there can be no general contribution, but each must bear his own loss.⁶

In a former letter, I have said, that it is a difficult and intricate question, whether, if, in consequence of the vessel being, voluntarily and designedly, run aground and stranded, the cargo be saved, but the vessel be totally wrecked in consequence of that stranding, should the cargo so saved be liable to contribute towards the value of the vessel so lost? No case of this kind has occurred, as yet, for decision in the courts of this country, and as it is scarcely possible, on such a subject, to give any general rule, which could apply to the varying circumstances of all cases that will occur, each case should rather, in my humble opinion, be determined by the peculiar circumstances under which each individual stranding was resolved upon, was carried into effect, and the consequent loss happened. It is, indeed, a question beset with difficulties, although, in considering that question under any circumstances, the general principle must never be lost sight of, that the stranding was voluntarily and designedly done, for the preservation of all. This, therefore, must be the ruling criterion in all cases of voluntary stranding; and, notwithstanding the host of foreign authorities against making the loss of the vessel, in consequence of the stranding, to be a subject of general contribution, yet, I venture to think, that the whole resolves into this question,—was the stranding the direct or immediate cause of the loss of the vessel? No doubt, the vessel would not be stranded with a view to her total destruction, where it is evident that would follow, if stranding be resolved upon; but, even here, if a vessel be stranded for the preservation of the cargo, under circumstances, or in a situation, which would necessarily imply, or, to all human probability, will be followed by, her total destruction,—is not this just a case within the general rule, of a part having been sacrificed for the benefit of the whole? Take the extreme cases: suppose, for instance, that the vessel, while in the act of stranding for the general safety, goes to pieces and becomes a total wreck, but, by the stranding, the cargo

⁶ Abbot, 490.

is saved,—it seems to be altogether against the general principle to hold, that, in this case, the loss of the vessel is not to be made up by a general contribution. But, on the other hand, put a case where the vessel has been stranded properly, and the cargo is in safety, and that, thereafter, by the violence of the wind and waves, or by an increase of the storm, the vessel, from her situation, becomes a total wreck,—in such a case, there seems to be good reason for holding this subsequent loss of the vessel, as not a subject for general contribution. Between these extreme cases, the shadows of distinction must be innumerable; and, as I have already noticed, each case must depend upon the peculiar circumstances in which stranding is resorted to and takes place.

Confessedly, as I now said, this question is beset with difficulties; but, fortunately, it is a question you are not called on to determine, and I have mentioned it merely in order to show you the cautiousness,—to use that term for want of a better,—with which, when a stranding becomes absolutely necessary for the general preservation, that stranding ought to be conducted. Should you be in a situation, at any time, where such a stranding has been resolved upon, you must be careful to preserve evidence of the circumstances in which that stranding was so resolved upon, and also of all that occurs during the actual stranding, as well as subsequent to it. There is little probability of your having the power to select the situation in which to strand the vessel; but should you have, I need hardly say, it ought to be done in the most eligible situation, as regards the safety both of the ship and of the cargo. Your greatest care must be given to the cargo, particularly if it be a general ship, because the stranding does not put an end to the contract, between you and the shippers, for the carriage of the goods; and if, in order to float the vessel, or to get her off the strand, it be necessary to unload the cargo, or part of it, and should any part be lost or amissing, you must be able to show that this loss arose solely from the stranding or wreck, otherwise you or your owners will be liable to the shippers for the value

of the goods so lost. You must be careful to enter in the log-book, all the particulars of the stranding, as well what happened before, as what took place during the course of, and after, the act of stranding, and to attest this entry by the subscriptions of yourself, your officers, or two or more of your crew. At the earliest opportunity, you must make a formal protest before a notary public, in which should be embodied the full particulars above mentioned; and you must also communicate to your owners the full particulars of the stranding, and do not content yourself, as I have known masters often do, with merely informing them that the vessel has been stranded. Indeed it will be prudent, in almost all cases to send your owners the principal instrument of protest, or, at least a transcript of the entries in the log-book, so as to put them in possession of full information, and to enable them to enter into such arrangements with the parties interested, and to take such other steps, as may be necessary. I will have occasion to resume this subject in my next letter.

I am, &c,

LETTER X.

Wreck—duty of master in case of—conduct of seamen—bound to exert themselves to the utmost—and to save as much as possible—officers to apply to in case of wreck on coasts of England, &c.—power to call assistance—waggons, carts, &c.—power to repel intruders by force—penalty and punishment for doing so—order in which authorities take charge—Consolidated Salvage Act—receivers of droits of Admiralty—remuneration of—lists of in custom-houses—power to pass and re-pass over lands, &c., and to place planks, &c.—damage, how to be ascertained—penalty for obstructing, &c.—examination as to wreck—fees of receivers for—penalty for refusing to be examined—receiver's fees for wreck—detention of vessel—remuneration of salvors—within what time must be made—when default of—custody of ship and cargo until compensation made, or security given—provision of statute as to disputed cases of salvage—if two justices cannot agree, must nominate third person—fees of third person—when amount of salvage must be determined by High Court of Admiralty—Commissioners of Salvage—powers and authorities of—appeal to High Court of Admiralty—how made—security to be given and transmitted to receiver—general with certificate—fee for certificate—proceedings on award—sale of property under—payment of sum awarded to party appointed by justices, &c.—distribution—appeal as to share of—when above £20, application to High Court of Admiralty—detention of vessel, goods, &c.—salvage in Cinque Ports—these ports and their limits—persons nominated by Lord Warden to fix salvage—commissioners decide all claims within jurisdiction—fees of commissioners—appeal from their decision—salvage in Scotland—under Queen Anne's Act—parties authorised to act—penalty on masters of vessels refusing assistance—payment of salvage—and adjustment of amount—custody of goods saved and sale of—master ought not to leave wreck—is not thereby discharged of responsibility, but bound to exert himself to the utmost—entry in log-book or statement of particulars must be made—formal protest must be made before notary public—purpose of so protesting—communication to owners, &c.—duty as to cargo saved—settling with crew and their discharge—surveys of ship and cargo—duty of master in regard to ship and cargo after surveys.

GENTLEMEN,

I now proceed to the subject of wreck; and, at the outset, I may remark, in general, that, when wreck has been occasioned by storms or tempests, or by any of the perils of the sea, the consequent loss of the vessel

must fall upon the owners alone, leaving them to claim from the underwriters, the value they may have insured on the vessel or freight.

In this letter, I do not intend to consider the principles upon which the individuals who may assist you in the preservation of the ship and cargo are legally entitled to be remunerated,—that will be the subject of a future letter;—but, here I will confine myself to what should be the conduct of yourself and your mariners, in the case of wrecks on the coasts of this country, and in what manner you are authorised to proceed.

In the first place, then, your great duty is to keep yourself cool, calm, and collected. Recollect, that a weighty responsibility lies upon your shoulders, and that you are, from the necessity of the case, constituted manager and trustee for all parties, and must attend to all, even conflicting interests. Besides, in many instances, independent of being attended with danger, the duties you have to perform to the different parties are arduous, and must be encountered with firmness, fortitude, and perseverance. At such a time, it is not for you to forget that you are still master,—that you are still in right to command, and must be obeyed,—and that you are still, even more now than ever, entrusted with the care of the interests of all concerned. It may be thought superfluous,—but I am sorry to say it is not unnecessary,—for me to remark, that, in such an emergency, all your command over your temper and yourself must be exercised; and that, therefore, you must rigidly abstain from the use,—I do not say the *free* use, but the *use* even,—of spirits. This is not a time to fly to or indulge in spirituous liquors, either as a comforter under misfortune, or as giving you fortitude to encounter that misfortune. They will inflame in place of cooling your mind,—and will incapacitate rather than strengthen you for the performance of the arduous duties which have necessarily devolved upon you. At such a time, you require to use all the energy you can command, and you must be in a state, not only actively to superintend the whole, but to direct and command others. Besides, by having recourse to spirituous liquors, you are setting a

bad example to your crew, on whose exertions you ought chiefly to depend, and who, I need not say, are, on such occasions, too anxious to obtain access to the spirit-room.

Again, as to the seamen, they are bound by their contract, to abide by and protect the vessel through all perils; their whole services are pledged to the vessel, and they are bound to use their utmost exertions for the preservation of her and the cargo; and, by the misfortune, your authority over them does not come to an end, nor are they at liberty to leave the wreck until discharged by you. Too frequently, this time of misfortune is considered by them as a time of unbridled liberty; and, not unfrequently, they use that liberty to the worst of purposes. Commonly, their first object is to get the uncontrolled command of the spirit-room; and I need scarcely remark, to what disgraceful excesses their free use of spirits have been carried on such occasions, and to what melancholy and deplorable consequences, both for themselves and others, these excesses have often led. It may not be in your power, perhaps, altogether to prevent these at the time, but you know how to punish them afterwards. As I have just said, it is the bounden duty of the crew to use their utmost exertions for the preservation of the ship and cargo;—they are bound to obey your orders in relation to both, the same as if these had been in safety;—and they are bound to remain as long as you think proper, or as long as there are reasonable hopes of recovering portions of either. If they do so, they are entitled to have their wages satisfied out of the proceeds of the parts saved; for the crew cannot, in such a case, be considered as salvors, or entitled to a salvage remuneration; and, for their exertions, the preferable payment of their wages is the proper remuneration. By section 3 of the Merchant Seamen's Act, every surviving seaman producing a certificate from the master, or chief surviving officer, of his having exerted himself to the utmost to save the ship, cargo, and stores, is entitled, in all cases of wreck or loss of the ship, to his wages up to the period of the wreck or loss, whether the vessel may or may not have previously earned freight. But if they disobey your commands,—if their behaviour is impro-

per,—or if they refuse to assist in saving parts of the wreck,—a forfeiture of their whole wages is the consequence. It is foolish to suppose, that, in consequence of wreck, the seamen are free from their engagements, and are at liberty to dispose of themselves as they please,—are, in short, their own masters,—and can do as they please. They are still your servants,—as such are bound to do what you command them,—and, until discharged by you, are not at liberty to leave the wreck ; or, should they do so with no intention of returning, you will bear in mind, that this is a desertion working a forfeiture of wages, and of which, if the log-book is preserved, the proper entry should be made and authenticated.

I am now speaking of a case of general shipwreck on the coasts of this country, on which the vessel becomes a total wreck. In such a case, your first care must be, to save out of the wreck, as much of the cargo and of the ship as you possibly can. Generally speaking, you will find plenty of hands ready to assist you, and readier to assist themselves ; but you ought to be aware, that you are entitled to repel by force, every person intruding or pressing themselves on board, without your leave and sanction. You, yourself, are on no account to leave the wreck, so long as there remains a chance of recovering part, or expose it to the pillaging and plundering of the country people, or commit it to the care of others for any longer time, than you may require to communicate to some one of the after-named officers, that you need assistance. In case of distress, or of the vessel being stranded or run on shore, or in danger of being so, on the coasts of England and Wales, or Ireland, every receiver of the droits of admiralty, as well as all justices of the peace, and also all mayors, bailiffs, and other officers of corporations and post-towns, and all constables, head-boroughs, tithing-men, and officers of the customs and excise, can summon and call together, as many men as may be thought necessary, to the assistance and preservation of the vessel and its cargo, or for the saving of human life ; and, if there be any ship or vessel belonging to any of her Majesty's subjects, or any

waggon, carts, and horses, near to the place where such ship is in distress or danger, the officials before-named, or any of them, are, by the act, required and empowered to demand of the superior officer of such vessel, assistance by boats, or such hands as can be conveniently spared, and to demand the use of any waggon, carts, and horses, of the owner or person having charge thereof, for the service and preservation of such vessel in distress, or for the saving of human life; and every such superior officer, owner, or person, refusing or neglecting to comply, immediately, with such demand, for every such refusal or neglect, such person forfeits and pays any sum not exceeding £100.¹ No vice-admiral, or deputy vice-admiral of any county, or any agent of these officers must now, as such, receive, take, seize, or in any manner interfere with, any wreck of the sea, or any of the goods or articles mentioned in the act.²

Should the country people, in the mean time, and before the official assistance can be obtained, flock around the wreck, to assist, or more likely to plunder, and should you not be in a situation to repel them by force, which, I believe, is seldom the case in shipwreck, you must conciliate them in the best way you can, but, at the same time, act with firmness and confidence. You are aware, that, for the real services any of them may render as salvors, they are entitled to a reasonable remuneration; but, by the same act, it is enacted, that every person who wrongfully carries away or removes any part of any vessel which is in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or article of any kind, belonging thereto, or (unless he be a receiver, or other officer, or justice authorised to give orders in case of wreck) who enters or endeavours to enter on board of any such vessel, without the consent or leave of the master, commander, or other superior officer thereof, or of a receiver or other officer so authorised to give orders in case of wreck, or who molests or impedes any person employed in the saving of such vessel or goods, or who endeavours to impede or hinder the saving of any such vessel or goods, for every

such offence, such person forfeits and pays any sum not exceeding £50.³ Where any person has been detained or taken before any justice of the peace for any such offence, it is lawful for the justices to proceed summarily on the case, without any information, and to convict such person of such offence; and, in default of payment of such penalty, to commit such person to any of her Majesty's gaols, for any time not exceeding six months, with or without hard labour.⁴ It is also made lawful for the master, commander, or superior officer of such vessel in distress, or the receiver, or other officer authorised by the act, to give orders in cases of wreck, respectively, to repel by force any such person as may, without such leave or consent, press on board that vessel.⁵

This knowledge will enable you, by determination and firmness, to restrain or overawe intruders from committing any outrage, until the proper authorities arrive with assistance; and, where a tumultuous rabble of country folks assemble, you may even induce some part of them, by the promise and hope of reward, to become the protectors of the wreck, and the salvors of the property. When any of the authorities before-mentioned arrives, and assumes the charge or command of the proceedings of the parties assembled at the wreck, or at the saving of the ship or cargo, the same statute enacts, that, for the prevention of confusion among the persons assembled to save any vessel in distress, or any of the goods or effects belonging thereto, all persons so assembled must conform,—1st,—to the orders of the master or owner, or officer in charge of the vessel in distress,—next,—to those of the receiver; and,—for want of their presence,—to those of the officers now to be mentioned in the following order, as any of such officers may be present. 1. The officers of customs or coast-guard. 2. Those of the excise. 3. Of the sheriff or his deputy. 4. Any justice of peace. 5. Any mayor or chief magistrate of any corporation. 6. Any coroner. 7. Any petty constable or peace-officer. Any person whomsoever acting, knowingly or wilfully, contrary to

such orders, on conviction before one justice of the peace, forfeits and pays any sum not exceeding £50.⁶

This act consolidates and amends the previous salvage laws, and repeals all the previous salvage acts, or parts of acts relating thereto, to the number of thirteen, and it is declared to extend to all parts of the United Kingdom, except Scotland.⁷ It was formerly held, that the statute 12 Anne, § 2, c. 18, extended to Scotland; but as that statute has now been repealed, the laws of salvage, and salvage proceedings in that country, are left to be regulated by the common law.

In addition to the enactments now given, as to the authorities to be applied to for assistance in cases of wreck, the same statute authorises the Receiver-General of Droits of Admiralty, from time to time, to appoint persons to act under him, to be styled, "Receivers of Droits of Admiralty;" and such receivers hold their offices during the pleasure of the Receiver-General, and the pleasure of the Commissioners of Admiralty; and these receivers are entitled to the fees mentioned in the act, together with a further remuneration, to be defrayed out of proceeds of sales of droits made by them, at the rate of five per cent., after abating charges and expenses incurred by them. The Receiver-General must send a list, containing the names and addresses of these receivers, to the collectors of customs at the different ports in England, Wales, and Ireland, and also to the secretary for managing the affairs of Lloyd's, in the city of London; and these officers, respectively, must cause the said list to be affixed, in a conspicuous place in the custom-houses of each of these ports, and at Lloyd's respectively. The receivers of droits of admiralty, appointed as aforesaid, are afterwards termed simply the receiver or receivers.⁸

You have now seen who, under the statute, you are entitled to call upon for assistance,—the punishment of intruders, and your power of repelling such,—and the order in which the official parties take the management; but there are other powers with which, in case of stranding or wreck, the statute invests these authorities,

yourself as master, or your owner, or the owners of the cargo, when present.

The statute enacts, that it is lawful for the receiver, at that part of the coast where any ship or vessel may be stranded or wrecked, or where any wreck of the sea or goods may be cast on shore, and also for the owner or master of such vessel, and for the owners of such goods, or any part thereof, and for any officer of the customs, coast-guard, or excise, and other officer, and for all persons whomsoever employed or acting in aid of, or in the assisting of such receiver, officer, master, or owner as aforesaid, in the saving or recovering of any such vessel, or the cargo, stores, tackle, or other articles belonging to the same, or in preserving the lives of the crew or persons belonging thereto, or of any wreck as aforesaid, to pass and repass with their horses, carts, carriages, or servants (doing as little damage as possible) over any lands, piers, jetty, wharf, or landing-place, near to the part of the shore where such vessel may be so wrecked or stranded, or on which such wreck may be cast, without interruption or obstruction by the owner or occupier thereof, for the purpose of saving, recovering, and preserving any such vessel, or goods, or stores, or any boat, cables, timbers, spars, masts, cordage, or other tackle or article belonging to any vessel, or for saving or otherwise assisting in preserving the lives of any persons, or for taking possession of any wreck or goods, or other article cast on shore, or found on shore, or found near thereto,—provided there be no road by which the parties may pass and repass, with as much convenience and expedition, as over such lands, piers, &c. And also to place any planks, timber, or any part of the wreck, or any goods or stores, or other article removed or saved from any such vessel, or any other wreck or goods, or other article as aforesaid, upon such land, pier, &c., for a reasonable time, until they can be removed to some warehouse or safe place of deposit, doing as little injury as possible, and making compensation to the occupier of such land, pier, &c., for any damage done by all or any of the means aforesaid, which compensation is a charge upon the wreck, goods, or other article

in respect whereof the damage may be done, in like manner as salvage. In case the parties themselves cannot agree as to the amount thereof, then the same must be ascertained and settled in any of the manners, and within such times, as the amount of salvage is directed by the act to be ascertained and settled.⁹

If any owner or occupier of any lands or premises, over which any person is authorised by the act to pass and repass, for any of the before-mentioned purposes, interrupt, impede, or hinder any such person from passing over his land or premises, with or without horses, carts, carriages, or servants, for these purposes, or any of them, by locking his gates, or refusing, upon request, to open the same, or otherwise, or obstructs or hinders the placing of any plank, timber, part of a wreck, goods, stores, or other article upon his land, pier, wharf, jetty, or landing-place, or prevents their remaining there for a reasonable time, until the same can be removed to some warehouse or safe place of public deposit, such owner or occupier, for every such offence, forfeits and pays any sum not exceeding £100.¹

Any receiver, or, in his absence, any justice of the peace, must, as soon as conveniently may be, examine upon oath (which oath either of these functionaries is empowered to administer,) any person belonging to any vessel which may be, or may have been, in distress, or others, who may be able to give an account thereof, or of the cargo or stores thereof, as to the name or description of the vessel, and the names of the master, commander, or chief officer and owners thereof, and of the owner of the cargo, and of the ports or places from or to which the vessel was bound, and the occasion of the ship's distress, and of the services rendered, and as to any other matter or circumstance relating to the ship, or cargo, or stores thereof, as the receiver or justice may think fit and necessary. For every such examination by a receiver, he is entitled to receive from the owner of the vessel or cargo, or out of the produce of the sale thereof, the sum of £1. And it is lawful for the receiver, or any officer of the customs at the request in writing

9 § 18.

1 § 19.

of the receiver, to detain the vessel or cargo until said sum be paid.²

If any person belonging to the vessel, or otherwise, refuse to be so examined by the receiver or justice as aforesaid, he, for every such refusal, forfeits and pays any sum not exceeding £50.³ From the terms of this section, particularly from two copies of the examination having to be sent, the one to the Receiver-General, the other to the Secretary of the Committee at Lloyd's, it is plain that such an examination must take place in every case where a vessel is or has been in distress, on the coasts of England, Wales, or Ireland.

Again, with respect to the remuneration of the salvors, and the custody of the ship or goods saved, until such remuneration and the receiver's fees be paid,—the act also provides, that every receiver who acts or is employed in the saving or preserving of any vessel in distress, which does not become a droit of admiralty, is entitled to receive from the owner thereof, the sum of £2 for the first day, and the further sum of £1 for every subsequent day, on which he may be employed in that service, if the vessel, together with the cargo thereof, be of or above the value of £600; and, if the ship and cargo be under the value of £600, the receiver is entitled to a moiety of such respective sums, and the vessel must be detained in custody of the receiver or officer of the customs, until such sums have been paid to the receiver.⁴

And, for the proper remuneration of the salvors, the statute enacts, that every person (except the receivers,) who acts or is employed in any way whatsoever, in the saving or preserving of any vessel in distress, or of any part of the cargo thereof, or of the life of any person on board the same, or of any anchors, cables, tackle, stores, or materials which may have belonged to any vessel, whether in distress or otherwise, or whether such person has so acted at the request of any person in authority, or by the master or owner of the vessel, or otherwise, such person must, within fourteen days after the service so performed, or within fourteen days after

2 § 16.

3 Ibid.

4 § 19.

the owner has established his claim, be paid a reasonable reward or compensation by way of salvage, for such service, by the commander, master, or other superior officer, mariners, or owners of the vessel, or their agent, or by the merchant whose vessel or cargo has been so saved, or by the owner of the other articles before mentioned, or other person claiming the same. In default of such reasonable reward or compensation being paid, the vessel, or any part of the cargo remaining on board thereof, so saved as aforesaid, must remain in the custody of the High Court of Admiralty, and the said goods or other articles (and also, until warrant issued from the High Court of Admiralty, the ship, vessel, or cargo,) must remain in the custody of the receiver or officer of the customs, until the person so acting or employed in the preservation of the vessel, goods, or other articles, has been reasonably compensated for his assistance and trouble, or reasonable security given for that purpose to the satisfaction of the receiver or officer of the customs, or High Court of Admiralty.⁵

But it will no doubt happen that the parties,—the owners or master, and the salvors,—cannot agree as to what is a reasonable reward or compensation for the services rendered, or disputes may arise as to the proper amount of salvage; and for these difficulties the act provides a cheap and expeditious remedy. It enacts, that if any person has rendered any service (except ordinary pilotage,) in the saving or preserving of any vessel in distress, or of the cargo thereof, or of the life of any person on board the same, and that person, and the master or owner of the vessel, or his agent, cannot agree upon the amount of salvage or compensation to be paid in respect of such service, then the former must deliver to the latter a statement in writing, without prejudice to either party, of the amount of salvage or compensation claimed for such services. And, unless such salvage has been already paid by any receiver under the powers in the statute, the matter or difference may be determined by any two justices of the peace, residing at or near to the place, where such service has

⁵ Ibid.

been rendered, within forty-eight hours after such difference is referred to them for their determination thereof; and if they cannot agree respecting what the salvage should be, then it is lawful for them to nominate any third person, *conversant in maritime affairs*, at their option, who must ascertain the amount of salvage to be paid, within forty-eight hours after he is so nominated. The justices and this third person have full power and authority, whenever they see occasion, to examine the parties or their witnesses upon oath, which they are authorised to administer.⁶

The third person so to be nominated by the justices, is entitled to demand and receive of and from the owner of the vessel, or of the articles so saved, or of the salvors or their respective agents, a sum of money not exceeding £2. 2s.; and the owner, or his agent, or the salvors, at the discretion of the justices or third person, must pay the same to the person so nominated, immediately after he has made his award or decision; and these £2. 2s., and the amount of salvage, may be recovered in the same manner as any penalty imposed by the act.⁷

But, when the salvage claim exceeds the sum of £200, then, and in every such case, the matter or difference must, in the event of no agreement being made as to the amount of salvage, either by reference to arbitration or otherwise, be determined exclusively by the High Court of Admiralty.⁸

The Commissioners of Admiralty may nominate and appoint, in such ports or towns, and for such districts, as they in their discretion may think fit, three or more proper persons for each port, town, or district, respectively, to be called Commissioners of Salvage, who, or any three or more of them, have power to adjust and determine any difference respecting salvage, in the same manner and in such cases as the justices are, as before mentioned; and the Commissioners of Admiralty can nominate and appoint a proper person to act as secretary or registrar to the Commissioners of Salvage, who must enter in a book kept for that purpose all proceedings of the commissioners, and also a copy of the awards they

6 § 21.

7 Ibid.

8 Ibid.

from time to time may make. These Commissioners of Salvage, or any three or more of them, have the power of examining on oath, and all other powers and authorities as are given by the act to the justices, and to the person to be nominated by them ; and they, or any three or more of them, who decide in any such case, and their secretary or registrar, are authorised to demand of and from the owner of the vessel, or of any article against which any person may make any claim or demand for service rendered in preserving the same, and the owner or salvors must pay such fee or reward, for deciding on every such claim, as may be regulated and appointed on that behalf by the Commissioners of the Treasury. The Commissioners of Salvage, or any three or more of them, have the power to commit for contempt.⁹

Should any person, claiming to be entitled to salvage, or compensation, for services rendered, as already mentioned, or the person against whom the claim is made, or his agent, be dissatisfied with the award and decision of the justices or third person nominated by them, or of the Commissioners of Salvage, it is lawful for either of them respectively, within ten days after the award has been made, to notify to the justices or commissioners, as the case may be, his desire of obtaining the judgment of the High Court of Admiralty, respecting the amount of salvage or compensation ; and, thereupon, the person must forthwith proceed, by taking out a monition, within thirty days from the date of the award. In such case, the receiver or officer of the customs,—in whose custody the vessel, goods, or other article, in respect of which such claim of salvage has been made, has been detained,—is, by the act, required and empowered to release the vessel, and to deliver to the owner or proprietor, or his agent, the goods or other article, upon good and sufficient security being given, in double the amount of the sum awarded for salvage or compensation ; or should no sum have been so awarded, then, to such an amount as the receiver may deem sufficient ; and this security the receiver is authorised to take and certify, according to the form given in the act, with which it is unnecessary to trouble you, as

⁹ § 22.

the receiver must take the security or bond strictly in terms of the act, for which they have printed forms. The receiver transmits the bond, without delay, to the Receiver-General, with a true certificate in writing, of the gross value of the article respecting which salvage is claimed, and also a copy of the proceedings and award, on unstamped paper, certified by the receiver who takes the bail, and such copy is admitted as evidence in the Court of Admiralty. For such certificate, the receiver is entitled to receive from the owner of the vessel, goods, or other article, or his agents, or from the proceeds of the sale thereof, the sum of £1. 1s.¹

After an award has been made, either by the justices, or the third person nominated by them, or by the commissioners of salvage,—should the owner of the vessel, goods, or other article, in respect of which the award of salvage is made, or his agent, refuse or neglect, either to pay the same, or to give notice, as now mentioned, of an appeal, or to take out a monition from the Court of Admiralty, it is lawful for the receiver, at or nearest to the place where such award has been made, and he is by the act required, within twenty days after the making of that award, and on production of the same, to sell the property contained in the vessel, or the goods, or other articles, as the case may be, or such and so many thereof, as, in his opinion, will be sufficient to defray the salvage, and the costs and charges relating thereto,—the surplus, if any, being paid to the owner or owners. But, in all cases which may be decided by the justices of the peace, or their nominee, or by the Commissioners of Salvage, the High Court of Admiralty has only jurisdiction as a court of appeal, in accordance with the provisions of the act, or for the purpose of enforcing payment of the sum awarded.²

Although you, as master, may have little concern with the distribution of the sum which may be awarded as salvage, to any of the parties who may be entitled to salvage, yet I think it is highly proper that you should know the rules of distribution, and how you should act, in the event of such a misfortune befalling your vessel,

1 § 23.

2 § 24.

as being stranded or in distress on the shores of England, Ireland, or Wales, or should you render assistance to any vessel in such a situation. And, therefore, whenever any sum has to be paid for salvage services, either voluntarily, or in consequence of any agreement, or of any arbitration, or of any award made by the justices or by the Commissioners of Salvage, or within the jurisdiction of the Cinque Ports, by any commissioners, and that sum is distributable between two or more persons, such sum must be paid to such person as may be appointed by the justices or commissioners, in and by their award, or by the arbitrator making the award, or under any agreement which may have been made; or, in case there should be no such appointment, then to the master or owner of the boat, ship, or vessel which has rendered the services, or his agent, or to some person nominated in writing, by or on behalf of the majority of the persons among whom that sum has to be distributed. The person to whom that sum may be paid for distribution, must proceed, within three days after it has been paid to him, or as soon after as may be, to allot that sum among the several persons interested in the distribution thereof, and to give notice to each of these persons, according to the form of the schedule annexed to the act, of the whole sum paid as salvage, and of the share allotted to such individual. Within thirty days after the sum awarded as salvage has been paid to the individual to whom the distribution has been entrusted, or within twenty-eight days after these notices have been given, and not afterwards, any person who claims a share of such sum, and who may think himself aggrieved, either by no allotment having been made to him, or by no notice of that allotment having been given to him within ten days after the sum has been so paid, or by the insufficiency of the share so allotted to him, or otherwise, such person can apply—if his share so allotted, or if no share has been allotted, then, if the share claimed by him be under £20—to the justices or commissioners who may have determined that salvage case, or within whose jurisdiction such a salvage case may have occurred; and these justices or commissioners have full power to

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yourself as master, or your owner, or the owners of the cargo, when present.

The statute enacts, that it is lawful for the receiver, at that part of the coast where any ship or vessel may be stranded or wrecked, or where any wreck of the sea or goods may be cast on shore, and also for the owner or master of such vessel, and for the owners of such goods, or any part thereof, and for any officer of the customs, coast-guard, or excise, and other officer, and for all persons whomsoever employed or acting in aid of, or in the assisting of such receiver, officer, master, or owner as aforesaid, in the saving or recovering of any such vessel, or the cargo, stores, tackle, or other articles belonging to the same, or in preserving the lives of the crew or persons belonging thereto, or of any wreck as aforesaid, to pass and repass with their horses, carts, carriages, or servants (doing as little damage as possible) over any lands, piers, jetty, wharf, or landing-place, near to the part of the shore where such vessel may be so wrecked or stranded, or on which such wreck may be cast, without interruption or obstruction by the owner or occupier thereof, for the purpose of saving, recovering, and preserving any such vessel, or goods, or stores, or any boat, cables, timbers, spars, masts, cordage, or other tackle or article belonging to any vessel, or for saving or otherwise assisting in preserving the lives of any persons, or for taking possession of any wreck or goods, or other article cast on shore, or found on shore, or found near thereto,—provided there be no road by which the parties may pass and repass, with as much convenience and expedition, as over such lands, piers, &c. And also to place any planks, timber, or any part of the wreck, or any goods or stores, or other article removed or saved from any such vessel, or any other wreck or goods, or other article as aforesaid, upon such land, pier, &c., for a reasonable time, until they can be removed to some warehouse or safe place of deposit, doing as little injury as possible, and making compensation to the occupier of such land, pier, &c., for any damage done by all or any of the means aforesaid, which compensation is a charge upon the wreck, goods, or other article

in respect whereof the damage may be done, in like manner as salvage. In case the parties themselves cannot agree as to the amount thereof, then the same must be ascertained and settled in any of the manners, and within such times, as the amount of salvage is directed by the act to be ascertained and settled.⁹

If any owner or occupier of any lands or premises, over which any person is authorised by the act to pass and repass, for any of the before-mentioned purposes, interrupt, impede, or hinder any such person from passing over his land or premises, with or without horses, carts, carriages, or servants, for these purposes, or any of them, by locking his gates, or refusing, upon request, to open the same, or otherwise, or obstructs or hinders the placing of any plank, timber, part of a wreck, goods, stores, or other article upon his land, pier, wharf, jetty, or landing-place, or prevents their remaining there for a reasonable time, until the same can be removed to some warehouse or safe place of public deposit, such owner or occupier, for every such offence, forfeits and pays any sum not exceeding £100.¹

Any receiver, or, in his absence, any justice of the peace, must, as soon as conveniently may be, examine upon oath (which oath either of these functionaries is empowered to administer,) any person belonging to any vessel which may be, or may have been, in distress, or others, who may be able to give an account thereof, or of the cargo or stores thereof, as to the name or description of the vessel, and the names of the master, commander, or chief officer and owners thereof, and of the owner of the cargo, and of the ports or places from or to which the vessel was bound, and the occasion of the ship's distress, and of the services rendered, and as to any other matter or circumstance relating to the ship, or cargo, or stores thereof, as the receiver or justice may think fit and necessary. For every such examination by a receiver, he is entitled to receive from the owner of the vessel or cargo, or out of the produce of the sale thereof, the sum of £1. And it is lawful for the receiver, or any officer of the customs at the request in writing

⁹ § 18.

¹ § 19.

tion of the Lord High Admiral and the Lord Warden of the Cinque Ports extends from a point to the westward of Seaford, in the county of Sussex, called Redcliff, including the same,—thence, passing in a line one mile without the sand or shoal called the Horse of Willingdon, and continuing the same distance without the ridge and new shoals,—and thence in a line within five miles of Cape Grisnez, on the coast of France,—thence round the shoals called the Overfalls, and two miles distance from the same,—thence on a line without, and the same distance along, the eastern side of the Galloper Sands, until the north end thereof bears west-north-west true bearing from the west-north-west bearing of the Galloper, it runs in a direct line across the shoal called the Thwart Middle, till it reaches the shore underneath the Maize Tower,—from thence, following in a line of the shore, up to Saint Orsyth, in the county of Essex,—and, following the course of the shore, up to the river Cour, to the landing place nearest Brightlingsea,—from thence, in a direct line to Shoe Beacon,—and from thence, across the waters to Feversham,—and from thence, following the line of coast round the North and South Forelands and Beachy Head, till it reaches the said Redcliff, including all the waters, creeks, and havens between them.^s

The Lord Warden of the Cinque Ports, the two ancient towns, and their members, nominates and appoints three or more substantial persons, to adjust and determine any differences relative to salvage, which may arise between the master of any vessel, and the person or persons bringing such cables and anchors ashore; and in case any vessel is forced or cut from her cables or anchors, by extremity of weather, or by any other accident whatever, and leaves the same in any roadstead or other place within the jurisdiction of the Cinque Ports, two ancient towns, and their members, and the salvage cannot be adjusted between the parties concerned, then the same must be determined by any three or more of the persons so to be appointed as aforesaid, within twenty-four hours after such difference is referred

^s 1 and 2 Geo. IV., c. 76, § 18.

to them for their determination. These commissioners must, immediatly after their nomination, elect some fit and proper person, either a notary or a Master Extraordinary in Chancery, except to the port of Dover, where the registrar for the Court of Admiralty of the Cinque Ports must be the registrar, and which secretary or registrar must enter in a book to be kept for that purpose, all the proceedings of the commissioners, and also a copy of the awards which they, from time to time, may make; but such election is subject to the approbation of the Lord Warden for the time being.⁹

These commissioners can decide on all claims or demands whatever, which may be made by pilots, hovelers, boatmen, and other persons, for services of any sort or description rendered to any vessel, as well as for carrying off from the shore to such vessel, any anchors, cables, or other stores, from any port or ports of the coasts of Kent, Sussex, Essex, or the Isle of Thanet, within the aforesaid jurisdiction, as for the conveying and conducting of such vessels from the Downs and other bays and roadsteads on the coast of Kent, &c., or from the sea, or any other place, to Ramsgate, Dover, or any other harbour, port, or place on the said coasts, within the aforesaid jurisdiction; or for the saving and preserving, within that jurisdiction, any goods or merchandise wrecked, stranded, or cast away from any vessel,—the master or owner thereof, or their agents, being present at the place where the commissioners are sitting. These commissioners have also full power and authority to hear and determine on all cases whatever, of services rendered by pilots, boatmen, and others, to shipping within the aforesaid jurisdiction, whether such vessels should have been in distress or not. Whenever the commissioners see occasion, they can examine the parties or their witnesses upon oath, which oath is to be administered by the secretary or registrar.¹

The commissioners or their secretary who decide upon any such claims or demands, are entitled to demand and receive of and from the owners of such vessels, or the proprietor of any such goods or merchandises, against

whom any pilot, boatman, or person may make any claim or demand for services of any sort, rendered to such vessels, or for the sole saving and preserving any goods or merchandise wrecked, stranded, or cast away, within the aforesaid jurisdiction; and such owners and proprietors are required by the act to pay to them such fee or reward as shall be adjudged to them, in that behalf, by the Lord Warden of the Cinque Ports for the time being; but no person to be appointed a commissioner by virtue of the act has power or authority to act in any other port or place than that in which he is resident, or from which his usual place of residence is not distant more than one mile.²

In case of the party or parties so claiming to be entitled to salvage or compensation for services so rendered, or the party or parties who are to pay the same, being dissatisfied with such award and decision of the commissioners, it is lawful for either of them respectively, within eight days after such award is made, but not afterwards, to declare his or their desire of obtaining the judgment of some competent Court of Admiralty respecting the salvage or compensation as aforesaid; and thereupon such party or parties must forthwith be required by the commissioners to declare, whether he or they will proceed in the Court of Admiralty of the Cinque Ports, or in the High Court of Admiralty of England, and he or they must so proceed within twenty days from the date of the award, by taking out a monition against the adverse party; but, in such case, the commissioners are empowered and required to permit the ship and her cargo, notwithstanding such declaration and proceeding, to depart on her voyage, or to deliver to the owners and proprietors, and their agent, any goods or merchandises respecting which any claim of salvage has been made,—upon the owners or proprietors, or their agent, giving good and sufficient bail in double the amount of the sum awarded.³

As the act first referred to does not extend to the jurisdiction of the Cinque Ports, and as in the act for these ports, the 12th Anne, c. 18, is specially incorporated,

and as that act has been held to extend to Scotland, to which it is specially declared the present English Salvage Act does not extend, it may, with some reason, be contended that Queen Anne's Act is not repealed so far as regards that country. This is a question for the decision of the courts of law; but, until it be decided that Queen Anne's Act is altogether repealed, I think it is right to detail to you its enactments, in case you should meet in with a misfortune on the coasts of Scotland, in which salvage service is required.

By that act, it is enacted, that the sheriff, justices of the peace, mayors, bailiffs, and other head officers of corporations and post towns near adjoining to the sea, and all constables, headboroughs, tithing-men, and officers of the customs, in all and every such places, must, on application made to them, or any of them, for, or on behalf of the commander or other chief officer of any ship belonging to any of her Majesty's subjects, or others, being in danger of being stranded, or run on shore, or being stranded or run on shore; and they are empowered and required to command the constables of the several ports within her Majesty's dominions, nearest to the sea-coast where any such ship may be in danger, to summon and call together as many men as may be thought necessary to the assistance and for the preservation of that ship so in distress as aforesaid, and their cargoes. If there be any ship belonging to her Majesty, or any of her subjects, riding at anchor near the place where such ship is in distress or danger, the officers of the customs, or constables, or any of them, are empowered and required to demand of the superior officers of such ship so riding at anchor, assistance by their boats, and such hands as can conveniently be spared, for the service and preservation of the ship in distress. And, in case such superior officer refuse or neglect to give such assistance, he forfeits for the same the sum of £100, to be recovered by the superior officer of the vessel in distress, in any of her Majesty's courts of record.⁴

The collectors of customs, and the master or commanding officer of any ship, and all others who act or

⁴ § 1.

are employed in the preserving of any ship in distress, or their cargoes, must, within thirty days of the services performed, be paid a reasonable reward for the same, by the master, or other superior officer, mariner, or owner of that ship, or by the merchant whose ship or goods have been so saved. In default thereof, the ship or goods saved remain in the custody of the officer of the customs, until all charges are paid, and until that officer, and the master, or other officer of the vessel rendering assistance, and all others so employed, are reasonably gratified for their assistance and trouble; and in case, after such salvage, the commander or owners of the ship so saved, or the merchants interested therein, disagree with the officer of the customs, or his deputy, touching the amount of monies deserved by any of the persons so employed,—they nominate three of the neighbouring justices of the peace, who thereupon adjust the *quantum* (amount) of the monies or gratuities to be paid to the several persons acting, or who were employed, in the salvage of the ship, &c., and such adjustments are declared to be binding on all parties, and the amount can be recovered in an action of law, to be brought by the persons to whom the same has been so allotted.⁵

In case it happen that no person appears to make his claim to all or any of the goods saved, then the chief officer of customs, of the nearest port, must apply to *three* of the nearest justices of the peace, who put him, or some other responsible person, in possession of these goods,—the justices taking a written account of the goods, to be signed by the officer of the customs. And if the goods be not legally claimed, within twelve months next ensuing, by the rightful owner, then public sale must be made thereof; and, if perishable goods, they can be forthwith sold, and, after deducting all charges, the residue of the monies arising from such sale, with a fair and just account of the whole, must be transmitted to her Majesty's exchequer, there to remain for the benefit of the rightful owner, who, when appearing, and claiming in terms of the act, is entitled to receive the same out of the exchequer.⁶

5 § 2.

6 Ibid.

I have already said, that in case of wreck, you must on no account leave that wreck, and expose the ship and cargo to pillage. It is your duty to take energetic measures for saving all you can; and, in doing so, you will, no doubt, ask and readily obtain, the advice and assistance of the nearest agent of Lloyd's. You should bear in mind, however, that Lloyd's agent is no official person, and has no authority to act in any emergency. He is merely the private agent of the underwriters at Lloyd's; and although he, as such, may give his advice and assistance, he need not do, and ought not to do anything more. It is a foolish notion, therefore, to think that, by putting the wreck under the charge of an agent of Lloyd's, you either have done your duty, or freed yourself from responsibility. You are a common carrier, and your duty as such is, to deliver safely the goods entrusted to you. The wreck does not relieve you of your strict responsibility as a carrier, and you are bound, to the utmost of your power, personally, to use every endeavour for the preservation and safety of the goods. I again repeat, therefore, that, on no account, you must leave the wreck, until you have used all means for recovering, saving, and preserving all that can possibly be recovered, saved, and preserved; and you ought not to leave the wreck under the charge of any person whatever, whether an agent at Lloyd's, or whoever else. You have already seen whom you can call upon officially for assistance, and who can summon the necessary assistance, and these are entitled to remuneration as salvors merely, but they certainly are not entitled, and it would be folly to allow them, to take the charge over your head, or even with your consent,—as their doing so may increase, but never can lessen, the responsibility which attaches to you.

As, then, your first duty is, to save and preserve as much of the vessel and of the cargo as you possibly can, your next duty must be, to enter in the log-book all the particulars, from first to last, attending the wreck and the preservation of it, including the conduct and exertions of the crew, and the exertions and names of the salvors. If the log-book has not been saved, you

should draw up, on the spot, if the materials can be obtained, or at the nearest place where they can be so, a full statement of all these particulars; and the entry in the log-book, or this statement, must be authenticated by yourself, your surviving officers, and two or more of the crew.

Having, thus, taken every precaution to insure the safety and preservation of all that can be saved of the ship and cargo, and adopted the proper means for preserving evidence of what took place previous to, during the time of, and subsequent to the wreck,—your next duty is, to find out the nearest notary-public, and cause him to take a formal protest, in which must be embodied an almost verbatim copy of the entries in the log-book, or the other written statement, enlarged, if necessary, and to the truth of this protest, you, your officers, and the two or more of your crew, must make solemn affirmation. It is absolutely necessary, therefore, that this protest contain nothing but a true statement and honest declaration of the truth, and of the facts, as these actually occurred, and of the conduct which, under the circumstances, you thought proper and necessary to follow. But, then, although this protest is certainly very necessary, so as to show that every thing has been done in an honest and straightforward manner, yet this protest is not of such primary importance as to induce you to leave the wreck, and travel perhaps to a distance, merely for the sake of so protesting. A protest is merely a matter of secondary evidence, and, of course, of secondary consideration. For, although your information to the notary may be nothing but the truth, it is not evidence in a court of law, either for you or your owners, of the statements made in the protest, or of the truth of these statements, but it may be used as evidence against you and your owners; and, therefore, whether you protest or not, is not a matter of that importance, to require you to leave the wreck on any account, until you have done your utmost to save and protect as much as you can.⁷

At the same time, you must communicate to your owners, and, indeed, it would be proper to do so also to

⁷ Abbot, 380.

the shippers or consignees, and to the underwriters, when known, a full account of what has happened. You ought to send your owners the notary's instrument of protest, and if that cannot be obtained in time, to forward to them a copy of the entry in the log-book, or of the written statement, which you had drawn up and attested by yourself, your officers, and part of your crew, and which ought, at all events, to accompany your letter. An abandonment made by you before the notary, is of no earthly avail; but as, by the wreck, you are constituted agent for your owners, the shippers, and the underwriters, and are bound to do the best in your power for the interest of all concerned, it is clearly your duty to put these parties in possession of full information, so as to enable them to judge and act for themselves.

With regard, again, to the cargo saved, your duty is, in the first place, to attend to its safety and preservation. Having done so, you ought to wait for instructions from the owners or the underwriters, as to your future proceedings; and you ought not to think of selling or disposing of it, before you receive these instructions. By the Salvage Act, before referred to, the Commissioners of Customs and Excise are required to permit all goods, wares, and merchandise saved from a vessel stranded or wrecked on its homeward voyage, to be forwarded to the port of its original destination, and also to permit goods, &c., saved from a vessel stranded or wrecked on an outward voyage, to be returned to the port at which the same were shipped,—taking security for the due protection of the revenue in respect of such goods, &c.^a Your duty, therefore, is plain,—to take care of the preservation and safety of the goods—to hold them as the carrier—and to await and obey the instructions of the owners or underwriters. In this country, a few posts, at most, will convey to the owners a knowledge of your situation, and a few other posts will bring to you their intentions and instructions as to these goods. It can scarcely be supposed, that any pressing necessity will exist for your disposing of the goods in the mean time, and as little can it be supposed that the goods, if worth

saving at all, would be so much damaged as to render it absolutely necessary so hastily to dispose of them. At all events, you ought not to take upon you to dispose of the goods for the purpose of paying the salvage claims, as the property so saved will be under the control and in the custody of the receiver, or of an officer of the customs, for the benefit of all concerned. The advisable course would be, to leave the claims of the salvors for after adjustment, in terms of the Salvage Act, if parties cannot agree, and not to settle or pay these claims at the time, far less to dispose of any of the saved property for that purpose.

I have already said, that the seamen are bound to abide by the ship, and to use their utmost endeavours to save as much of it, and of the cargo, as they possibly can. If they do so, they receive no compensation in the name of salvage, for these services, but they are entitled to have their wages satisfied out of the wreck, so far as the proceeds go. To use the emphatic language of the late Lord Stowell, "a seaman has a right to cling to the last plank of a ship, in satisfaction of his wages, or part of them;" and, therefore, if you have funds sufficient, these wages ought to be paid at the time of the seamen's discharge. But if you have no funds, and no credit for raising funds, you can, at all events, draw on your owners, and deliver to each seaman a bill for the amount due to him, or, in a case of urgent necessity, you may sell as much of the wreck of the vessel, which would have to be sold at one time or other, as will enable you to discharge these claims for wages. Upon discharging the seamen from the wreck,—which you ought to do as soon as, but not before, all has been saved that can be saved,—you have to grant each of them a certificate, in terms of the act, stating the period during which they have served on board,—the time and place of discharge,—and the cause of that discharge,—and, if the exertions of any of them, in saving parts of the wreck and cargo, have been meritorious,—these exertions should be noticed most favourably in your certificate.⁹

It will be highly proper to obtain, as early as possi-

⁹ 7 and 8 V., c. 112, § 13.

ble, surveys of the ship and cargo. If the ship has become a mere wreck, or just a mere assemblage of planks and timbers, it will be of little utility to have a survey of it, as the prudent course is, for you or your owners, or the underwriters, afterwards to dispose of these where they lie ; but if the vessel still retains the character of a ship, and is capable of repair, both ship and cargo saved ought to be surveyed by competent persons, and a report of the survey made upon oath, to the competent authority, by whom these surveyors may have been appointed. Whatever these surveyors may recommend,—whether that the vessel should be repaired or sold, or that the cargo being perishable, or much damaged, should be sold,—it will be your duty to forward copies of these surveys to your owners, as well as to the shippers and consignees, or the underwriters, and allow them to determine what is best to be done. At all events, it will not be prudent for you, in such circumstances, to take any steps for selling either the vessel or the cargo, without their instructions. You are merely an agent for all parties, and, as such, bound to do the best you can for the interests of all concerned ; and you must, therefore, act as an honest man would do, were he the owner of the whole, and uninsured. No doubt, you will find Lloyd's agent, whose duty it is from his appointment, to give his advice and assistance in such cases, and to superintend and protect the interests of all, as well as other respectable parties,—willing to give you their advice and assistance ; but while you will, in all likelihood, avail yourself of such advice and assistance, so far as proper, you, as a common carrier, should always bear in mind, that you must act upon your own responsibility,—and, therefore, you must follow that advice, only in so far as you yourself think it should be adopted, and avail yourself of that assistance, only in so far as you see it will be conducive to the general good.

I am, &c.

LETTER XI.

Salvage—legal meaning of term—what are salvage services—crew's exertions not salvage services—unless in rescuing from enemy or pirates—pilotage not a salvage service—what are pilotage services—vessels of royal navy, when entitled to salvage—steam vessels, salvage services rendered by—salvage services to vessels sailing as consorts—when owners entitled to claim—preservation of life now remunerated—who are salvors—generally, not crew nor passengers—pilots' services not salvage—voluntary salvors—constructive salvage by magistrates and officers—masters of vessels—person must be actually occupied—claims of owners—claim of salvors not impaired by quitting possession—first salvors entitled to prevent others—when second salvors entitled to claim—while master in command, he may employ other assistance—officers and sailors of royal navy—who liable in salvage—freight included in subjects liable to salvage—salvage may fall wholly upon freight—amount of salvage remuneration—general rule—criteria for ascertaining—what constitutes a salvage service—rules of remuneration.

GENTLEMEN,

I now proceed to the consideration of what are properly salvage services, and the remuneration which should be awarded these, in so far as the former do not fall under, and the latter is not regulated by, either of the statutes detailed in the preceding two letters. At the outset I may remark, that the term *salvage* is, in common language, used indiscriminately, to denote both the acts of saving the ship or cargo, and the reward or remuneration allotted to the salvors for so doing; but this is not the proper or the legal meaning of this word, as has been well remarked by a very competent judge:¹ the statutory meaning of the term "is confined to the remuneration allotted to salvors, under the name of salvage, for a direct salvage bounty, and in which they have the sole interest; and it does not go beyond that part of the cargo which may be sold for their

¹ Per Lord Stowell, in the *Jonge Nicolas*, 25th Nov. 1823; 1 Hag. 206.

“express benefit.” Although, therefore, in the following letter, the term salvage will be applied to both the services performed, and the remuneration which is to be made for these services, yet you will understand that the proper and legal meaning of the term is only applicable to the remuneration allotted to the salvors as the reward for their services.

Let us see, then, in the first place, what are properly salvage services. And, in order to constitute salvage services, it seems to be the general rule, that these services must have been rendered to a vessel or her cargo while in danger, or in an impending danger, by which they are saved or recovered from that danger, or after having been abandoned, or actually lost. When, in such circumstances, aid and assistance has been sought and obtained, and the necessary services have been effectively rendered, these are truly salvage services, and the remuneration to be awarded must be estimated according to the extent of labour employed, and of danger incurred. You have already seen what, under the statutes, are held salvage services, and who are the proper authorities to whom application should be made. But these statutes imply, that there is an extent of time, and a degree of order and deliberation, which, I suspect, very seldom exist in actual experience; and, in such a misfortune, I doubt much if the practical rule is not—“save who can.” In such an emergency, then, it is necessary to know who, in law, are held to be really salvors, and, as such, entitled to remuneration for their salvage services.

In this emergency, therefore, and assuming all statutory laws and regulations to be laid aside, and that you are necessitated, in such case, to act on your own responsibility,—it is, of course, necessarily implied, that you avail yourself of all the assistance you can command, and that assistance will naturally be looked for, in the first instance, from your own crew. As already remarked, the crew of vessels in distress are bound to use their utmost endeavours to save her and the cargo from danger, but the services so rendered by them are not always salvage services, nor are they to be rewarded as

salvors. Neither are the exertions made by some of the crew of a vessel, in rescuing her from the power of another part who had mutinied, to be considered as salvage services;² but, when the crew, or part of the crew, rescue the vessel from the hands of an enemy, or from pirates, this is held to be a salvage service, entitling them to a salvage remuneration.³

Pilotage is not to be confounded with salvage services, unless the peculiar circumstances of any special case distinguish the services so performed from general pilotage services. If extraordinary pilotage services have been rendered to a vessel in distress, an additional pilotage is the proper rate of reward for these; and where the character of a pilot has been assumed, the party doing so is to be remunerated according to the rates for pilotage services, and not as a salvor.⁴ Should pilots not make a fair trial to get off to a vessel in distress, during two days, when there might have been danger and difficulty, but go off on the third day, when there was no difficulty, as the weather was moderate, and the wind fair for the harbour, this did not amount to a salvage service, but to pilotage only.⁵

Although the vessels of the Royal Navy are bound to assist merchant ships of this country in distress, yet when these services have been extraordinary and important, they are considered as salvage services, and receive a salvage remuneration;⁶ but, in order to entitle them to claim such remuneration, the services so rendered must be important, and there will be no claim where the services are slight, and, more especially, when the demand for remuneration is not promptly made,—say, made only after a delay of eight months.⁷ But salvage is not due to a vessel of the Royal Navy, for rescuing a convict ship from the possession of the convicts, and of the mutinous crew and soldiers on board,⁸ nor is

² Governor Raffles, King, 2nd May, 1815; 2 Dod. 14.

³ The Beaver, Connor, 16th May, 1801; 3 Rob. 292.

⁴ The Enterprise, Crosbie, 12th March, 1828; 2 Hag. 178.

⁵ City of Edinburgh, Fraser, 21st January, 1831; 2 Hag. 333.

⁶ Louisa, Higginbotham, 12th November, 1813; 1 Dod. 217. Mary Ann, Ferrier, 24th June, 1823; 1 Hag. 158.

⁷ Rapid, Cochrane, 8th February, 1838; 3 Hag. 419.

⁸ Francis and Eliza, 7th May, 1816; 2 Dod. 115.

salvage due for rescuing from the enemy a hired transport employed in the same expedition.⁹

In consequence of the great power of steam vessels, and the complete control under which these are, the effective salvage services and assistance of such vessels to ships in distress, are to be encouraged, and additional remuneration is allowed to such.¹ As, in a value of £12,246,—£1000 were awarded to a steamer as salvage, for towing a vessel,—in a most helpless state, and in most imminent danger,—to a place of comparative safety,—the stipulated payment to a steamer hired to bring her into port, being the criterion for the salvage remuneration.² And where a government steamer assists a merchantman, under a stipulation to reimburse all expenses arising from damages to the steamer or her stores,—it was held, that such stipulation was no bar to a salvage compensation.³ But salvage services, which entitle to a salvage remuneration, must be distinguished from towing, which steam vessels are frequently engaged to do; for, where a vessel, suddenly dismasted, was, while at anchor and with jury masts, taken in tow for nine hours by a valuable steamer, which had been engaged for that purpose,—it was held, that, nautically, the service was towing, without risk on either side.⁴

Upon the same principle, salvage services to steam vessels with passengers are to be encouraged, and, in ordinary cases, the remuneration for these services should exceed a mere proportion of the value. As, where two smacks went out, with enterprise and alacrity, to a steamer, and towed her in, after having taken out and landed the passengers,—out of a value of £1265, the court gave £350;⁵—and salvage remuneration was allowed for the services of 150 boatmen and a steam-tug, to a valuable steamer with passengers, on the rocks inside of Holy Island.⁶

If vessels sail as consorts, and under an agreement to

⁹ *Belle*, Bates, 8th March, 1809; Edw. 66.

¹ *Baikes*, Gardiner, 7th May, 1824; 1 Hag. 246.

² *Traveller*, M'Clear, 26th April, 1837; 3 Hag. 370.

³ *Lustre*, Finlay, 7th February, 1834; 3 Hag. 154.

⁴ *Isabella*, Monro, 2nd March, 1839; 3 Hag. 427.

⁵ *Ardincaple*, M'Leod, 22nd January, 1834; 3 Hag. 151.

⁶ *The London Merchant*, Laker, 31st May, 1837; 3 Hag. 196.

render mutual assistance, as in the Greenland trade, each vessel enjoys the benefit of this agreement, and, therefore, should any accident or calamity happen to either, the vessel so situated reaps the benefit of this mutual stipulation, and there is no salvage remuneration due for services rendered by the one to the other.⁷ But loose conversations, at the time the services are rendered, will not be considered as conclusive, either in regard to the services so rendered, or as to the amount of the reward to be given for such services.⁸

If an agreement is made by a vessel in distress, with the master of another vessel, to render assistance for a sum certain, and that assistance is given, and the vessel and cargo are placed in safety, the court will not entertain a claim from the owner of the vessel so assisting, for salvage, over and above the sum so agreed on.⁹ But when these salvage services are rendered without any such agreement, although, strictly speaking, the master and crew are the only salvors, yet the owners are entitled to a claim, under the equitable consideration of the court, for the risk to which their vessel, boats, &c., or other property, may have been exposed.¹

The mere bringing into port a barge found aground on a sand bank, without anchor or crew, but in a place where it was a common usage to leave such barges, is not such a service as entitles the parties doing so, to a salvage remuneration.²

Formerly, the English Court of Admiralty had no power of remunerating the mere preservation of life;³ but, by the English Salvage Act, the saving or preserving the life of any person on board a vessel in distress, or wrecked, or stranded, or in danger of being wrecked or stranded, is now deemed a salvage service.⁴

Having, thus, seen what are to be considered salvage services, let us next see who, in law, are the parties held to be salvors, and, as such, entitled to salvage remuneration.

⁷ *Zephyr*, Arrowsmith, 17th February, 1827; 2 Hag. 43.

⁸ *Salacia*, Garland, 2nd July, 1829; 2 Hag. 265.

⁹ *Mulgrave*, Garbutt, 26th March, 1827; 2 Hag. 77.

¹ *San Bernardo*, 18th February, 1799; 1 Rob. 178.

² *Upnor*, Hadlow, 2nd May, 1826; 2 Hag. 3.

³ *Ald*, Teasdale, 31st July, 1822; 1 Hag. 83.

⁴ 9 and 10 V., c. 99 § 19.

I have already repeatedly said, that the crew of a vessel cannot be considered as salvors, nor as entitled to salvage remuneration for their services and exertions, in regard to their own ship and cargo when in distress; and, although a passenger is not bound to remain on board a vessel in the hour of danger, and, when he has opportunity, may leave her, yet, when he does remain, he is bound to give all the assistance he can, and it is more particularly his duty to do so, when he himself is a naval officer.⁵ But if a person who has had command of vessels, and who is a passenger in a vessel which is in a situation of danger, and is deserted by the master and part of the crew,—takes,—with consent of the mate and the rest of the crew, the command of the vessel, and brings her into harbour,—he is entitled to be paid for his services.⁶ And, when the crew of another vessel had been received, for their passage home, into a vessel afterwards in distress,—although they may be expected to render something like the same assistance as her own crew, yet, when they work night and day, while she is so in distress, they are entitled to some reward for these salvage services.⁷

In like manner, the services of pilots are not, in general, to be confounded with, or exalted into, a claim of salvage. No doubt their occupation may be, in many instances, attended with danger; but, having assumed the character, occupation, and duties of a pilot, they are bound to be in readiness, so as to afford their services, at all times, and in all weathers, and not as salvors.⁸ They are, therefore, bound to offer their services in all weathers, and their claim for extra compensation for these services, is held to be a matter of strict law;—as, where towing is necessary, pilots are bound to perform it, merely having a claim of compensation for any damage done to their boats, or for extra labour.⁹ If extraordinary pilot's services are required to a vessel in distress, an additional pilotage,—say double the rate of common pilotage,—is the proper rate of reward for

⁵ *Branton, Wilson*, 26th June, 1826; 2 Hag. 3.

⁶ *Newman v. Walters*; 3 B. P. 612.

⁷ *Salacia, ut sup.*

⁸ *Columbus, Nerroll*, 13th June, 1828; 2 Hag. 178.

⁹ *General Palmer, Truscott*, 13th May, 1828; 2 Hag. 176.

such services;¹ and, in a case already referred to, where pilots did not, for two days, make a fair trial to get off to a vessel in distress, but, on the third day,—when there was no danger,—the weather moderate, and the wind fair for the harbour,—they went off;—and they were found entitled, not to salvage, but to pilotage merely.²

In the ordinary case, it is those persons voluntarily lending their assistance, or whose assistance is required by the master, or by the proper civil authorities, who are held the true salvors, and, properly speaking, it is those by whom the ship or cargo have been saved or recovered, and on whom the duty of restoring these lies, who are strictly the actual salvors.³ The magistrates and officers who take charge of and superintend the wreck or stranding, have also a constructive claim to salvage reward, on the special ground of an extensive contribution of assistance;⁴ and masters of vessels who are applied to for assistance, and who readily and promptly afford effective assistance and advice, are entitled to the first share of the remuneration, as a sort of flag-eighth.⁵ But it is the general rule, that a person not actually occupied in effecting a salvage service, is not entitled to share in the salvage remuneration; and the claim for a share of such remuneration, by an officer of a coast-guard detachment who sent his men and boat, but did not assist in person, has been rejected.⁶ That part, however, of a ship's crew going on board a vessel found in distress, and bringing her into port, have no exclusive claim to the salvage remuneration due for her preservation; but those who remained in the ship, if equally ready to go, are equally entitled to share in that remuneration.⁷

The owners of the vessel or vessels assisting in the salvage service, have also a claim, under the equitable consideration of the court, for the risk of their vessels, &c.,⁸ and, therefore, the owners are entitled to a share

¹ *Enterprise*, Croasbie, 13th May, 1828; 2 Hag. 178. N.

² *City of Edinburgh*, Fraser; 21st January, 1831; 2 Hag. 333.

³ Per Sir John Nicholl, in the *Thetis*; 20th March, 1833; 3 Hag.

⁴ *The London Merchant*, Laker, 31st May, 1837; 3 Hag. 394.

⁵ *Baltimore*, Baker, 27th June, 1817; 2 Dod. 182.

⁶ *Vine, Jay*, 4th November, 1825; 2 Hag. 1.

⁷ *Baltimore*, *ut sup.*

⁸ *The San Bernardo*, 18th February, 1799; 1 Rob. 178.

of the salvage remuneration awarded, as a compensation for demurrage, repairs, risks, and all expenses;⁹ unless where the master of the vessel in distress has entered into an agreement for a sum certain, with the master of another vessel, for assistance, in which case the owners of the latter vessel will have no claim for a further sum, on the grounds now mentioned.¹

It is a foolish notion, that salvors impair their title to remuneration, by quitting the ship which they have been instrumental in saving;² but, where the salvors are in possession, they have a legal interest, which cannot be divested without adjudication in a competent court, and it is not for her Majesty's officers, or any other persons, ~~on~~ the ground of superior authority, to dispossess them without cause.³ The first occupants as salvors, are entitled to prevent the interference of all others;⁴ and where the salvage is already in the act of being performed, and under means sufficient for the purpose, such interference of a third party is not justifiable.⁵ The claim of a second set of salvors will not, therefore, be admitted, unless they can prove, either that their services have been adopted, or that the first possessors were incompetent,⁶ or that the first would not have been able to effect the purpose without the aid of the others, and that their further assistance was necessary for the preservation of the property.⁷ But such prior salvors have no right in themselves, while the master is in command, to interfere with further assistance, and to attempt to exclude any subsequent assistance, and such misconduct diminishes their title to salvage remuneration.⁸

By the law of England, the officers and crew of her Majesty's vessels are entitled to a salvage remuneration for valuable and important services rendered to merchant

⁹ *Jane, Hudson*, 2nd March, 1831; 2 Hag. 383. *Hope, Norman*, 17th Feb. 1832; 3 Hag. 423. *Martha, Viner*, 4th July, 1836; *Ibid.* 434.

¹ *Mulgrave, Garbutt*, 25th March, 1827; 2 Hag. 77.

² *Eleanora Charlotta, Osterman*, 17th June, 1823; 1 Hag. 156.

³ *Blendenhall, Barr*, 20th May, 1814; 1 Dod. 414.

⁴ *The Effort*, 1st July, 1834; 3 Hag. 165.

⁵ *Maria, Kilstrom*, 27th August, 1809; *Edw.* 174.

⁶ *Eugene, Bourne*, 15th May, 1834; 3 Hag. 156.

⁷ *Charlotta, Nesser*, 14th May, 1831; 2 Hag. 364.

⁸ *Dantia Packet, Tanner*, 10th May, 1837; 3 Hag. 363.

vessels in distress, but not for slight services, and not promptly demanded.⁹ And, although a government steamer assists a merchantman, on a stipulation to reimburse all expenses arising from damage to the steamer or her stores, yet such stipulation is no bar to salvage compensation.¹ For the personal risk and labour so encountered in a salvage service, the officers and crew of her Majesty's vessels are entitled to remuneration, upon the same footing as other salvors;² but, an officer of a coast-guard detachment, who sent his men and boat to effect a salvage service, but did not himself assist in person, is not entitled to share in the salvage remuneration.³

Having thus seen, what are salvage services, and the parties who may perform such services, let us now pass to the parties liable to pay salvage; and, in reference to them, the general rule is, that the owners of the property which has received the benefit, and which, but for the exertions of the salvors, would have been lost to them, are alone chargeable with the salvage reward.⁴ And, therefore, as salvage remuneration is a compensation to the salvors, not merely for the restitution of property made by them to the prior owners, but for the risk and hazard incurred by the salvors, and also for the beneficial service rendered the owners, in rescuing their property from the risk in which it was involved,—so the persons to contribute to the salvage reward, are the persons who would have borne the loss, had there been no rescue, and who, of course, reap the benefit of that rescue; and hence, to form a judgment who would have borne the loss, had there been no rescue, and to whom the rescue was beneficial, we must look to the interest which each party had.⁵

In the subjects liable to pay salvage, freight is included, if the voyage for which that freight was to be paid had commenced, and the freight was in the course of being earned at the time the salvage services were

⁹ *Mary Ann, Ferrier*, 24th January, 1823; 1 Hag. 158. *Rapid, Cochrane*, 8th February, 1838; 3 Hag. 419.

¹ *Lustre, Finlay*, 7th February, 1834; 3 Hag. 154.

² *The Wilsons*, 1 W. Rob. 172.

³ *Vine, Jay*, 4th November, 1825; 2 Hag. 1. ⁴ *Abbot*, 572.

⁵ *Lord Ellenborough*, in *Cox v. May*, 5th May, 1815; 4 M. S. 158.

performed.⁶ It may happen that the whole salvage will fall upon the shipowner and the freight,—as in the case quoted above. In that case, the ship and cargo had been captured and re-captured on her homeward voyage, and was sold by consent of all parties;—the owners and charterers made their respective claims, in the Court of Admiralty, to the ship and goods, and restitution was decreed on payment of salvage;—but, from the sale of the goods, the charterers had paid two sums of £2500 for salvage, and part of the freight had been paid;—and the proceeds of the residue of the goods fell short of the sum due for the balance of the freight; and, in an action by the shipowners against the charterers for this balance,—it was held, that the former, in respect of the freight, were liable to the whole salvage, and that the charterers, having paid the salvage contribution out of the proceeds of the goods under a security given by them, with consent of the owners, so far as their liability was concerned, for payment of salvage,—they could set this payment off against the claim for the balance of the freight.⁷

The last consideration is, the amount of salvage remuneration to be paid the salvors, and the manner in which that remuneration requires to be apportioned among the salvors, according to the nature and extent of the services rendered. The general principle is, that all shall share in this remuneration who have rendered salvage services in rescuing the property in danger, and upon which the contribution has been made.⁸ It is not merely the amount of service,—the work and labour performed,—which has to be considered, in order to determine the amount of this remuneration; but, it has been well said by high authority,—“that salvage is not merely a payment for work and labour; other considerations are to be adverted to,—the general interests of navigation, “and of the commerce of the country,—to encourage “exertion, and to excite to risk and peril in the relief of “property in danger. It is true, on the other hand, that “the court must guard against exorbitant demands, and

⁶ Dorothy Foster, Sowden, 24th July, 1805; 6 Rob. 88.

⁷ Cox v. May, *ut sup.*

⁸ Abbot, 582.

"undue advantage being taken of distress; but, when salvors act honestly and fairly, they are to be liberally rewarded, without a minute inquiry as to the amount of labour." And, in reference to the *criteria* by which the amount of remuneration has to be fixed, the same learned judge remarked, that—"the amount of remuneration must depend on all the circumstances; it is not a mere question of work and labour,—not a mere calculation of hours, though time is, undoubtedly, an ingredient,—but there are various facts for consideration,—the state of the weather,—the degree of damage and danger, as to the ship and cargo,—the risk and perils of the salvors,—the time employed,—the value of the property,—and, when these are considered, there is still another principle;—to encourage enterprise,—to reward exertion,—and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the award may fall upon an individual owner with some severity."¹

The same learned authority has, in the following words, ably stated the requisites or ingredients necessary to constitute an effective salvage service. "The ingredients," (says Sir John Nicholl,) "in a salvage service are, first,—enterprise in the salvors, in going out in tempestuous weather, to assist a vessel in distress,—risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects; secondly,—the degree of danger and distress from which the property is rescued, when it was in imminent peril and almost certainly lost, if not, at the time, rescued and preserved; thirdly,—the degree of labour and skill which the salvors incur and display, and the time occupied; lastly,—the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any, take place, the compensation can hardly be denominated a salvage compensation,—it is little more than a remuneration for work and labour."²

¹ Per Sir John Nicholl, in the *Hector*, 6th June, 1833; 3 Hag. 95.

¹ Per Sir John Nicholl, in the *Industry*, 1st May, 1835; 3 Hag. 204.

² Clifton, 22nd January, 1834; 3 Hag. 121.

As to the amount of the remuneration which is to be awarded the salvors, the English Court of Admiralty, in cases of civil salvage, does not recognise the rule of proportion, but awards an equitable remuneration, according to the extent of the services rendered, and of the labour performed, and the value of the property saved;—a larger proportion being awarded when the labour has been great, and the property of small amount; a less proportion when the property saved is of a greater value; and, when the value of the property saved is of much extent, a moderate proportion,—a small proportion being considered a sufficient equitable remuneration when the property is very large.³ In cases of derelict, (or anything forsaken and abandoned at sea,) the same court does not hold itself warranted in awarding a moiety, or one-half, without regard to the peculiar circumstances of each case.⁴ The salvage remuneration is in the discretion of the court, on a consideration of the whole circumstances connected with the salvage, and is apportioned according to the extent of that salvage service. In a case of derelict of great merit, even where the value is small, the court has given one-half, and allowed the expenses out of the other half;⁵ and, in another case, where a vessel postponed her homeward voyage in search of freight, and went out of port to a wreck, five hundred miles distant, and there, with great risk and exertion for several days, saved valuable property, and was afterwards compelled, by weather, to put back to the same port,—there sold the property, and transmitted the proceeds to this country to abide salvage,—a moiety was awarded, and apportioned among the owners, the master, mate, and crew.⁶ In such cases, the award, however, is discretionary,—seldom more than one-half, or less than one-third, being given; and in the case of an ordinary salvage, the court also exercises a discretionary power,—awarding remuneration on a view of all the circumstances of each particular case.

As already mentioned, the rule is, to award a larger

³ *Waterloo*, 27th June, 1820; 2 Dod. 442. *Salacia*, 2nd July, 1829; 2 Hag. 264.

⁴ *Aquila*, Lunsden, 27th November, 1798; 1 Rob. 37.

⁵ *Frances Mary*, Kendal, 28th March, 1827; 2 Hag. 69.

⁶ *Martha*, Viner, 4th July, 1838; 3 Hag. 484.

proportion when the property saved is of small value, and a less proportion where it is of large amount. For instance, in one case, where the value of the cargo saved was £38,000,—for the salvage of the *cargo*, the court awarded £1000 for contingent losses,—£1500 for salvage reward,—and £500 for the master's particular expenses;⁷ and, in another case, where the master of a whaler and a boat's crew of five men went, at the imminent peril of their lives, to assist a vessel at sea, with the water making a breach over her,—when they assisted in rigging a jury-mast, and afterwards towed her, during six days, into Plymouth;—out of £7000 of value, £1200 were awarded in the following proportions;—£700 to the owners for demurrage, repairs, risks, and all other expenses,—£200 to the master; £20 to each boatman,—and the rest of the crew to share the remainder, according to their interest in the voyage.⁸

I have already remarked, that salvage services rendered by and to steamers, are more liberally rewarded than salvage services rendered otherwise, in consequence of the great power these vessels possess, and the complete control which they are under.

What I have now said applies to salvage services rendered in any place, and to the salvage remuneration which has been awarded for such services in the English Court of Admiralty. The principles upon which salvage services have been recognised, and upon which a salvage remuneration is to be awarded, are so distinctly and satisfactorily explained in the authoritative quotations above given, that it is unnecessary to add one word, as I am satisfied that, if you carefully attend to the plain common-sense, and the sound law, given in these quotations, you will learn quite enough to guide you in any salvage dispute, in which you may unfortunately happen to be engaged, without involving your owners in law expenses.

I am, &c,

⁷ *Salacia*, *ut sup.*

⁸ *Jane*, Hudson, 2nd March, 1831; 2 Hag. 338.

LETTER XII.

Driven into an intermediate port—cargo damaged—vessel requiring repairs—in such case, master agent for all parties—survey—copies of survey and protest to be sent to the owners and shippers—sale of cargo—when master can sell and when not—master can only sell, if cargo perishable, and in particular circumstances—example of—opinion of Lord Tenterden—authority of Vice-Admiralty Court abroad to sell, no justification to master—what repairs must be given at intermediate port—must be no unnecessary delay—must pursue shortest course to port of destination—what repairs, general average—what not—must obtain proper accounts and receipts—and forward these to owners—if repairs exceed twenty shillings for every ton, must satisfy customs—refitting and transhipping—general rule as to repairing within reasonable time, or transhipping—when entitled to full freight—or to nothing—whether master bound to forward—rule of law as to—opinion of Lord Denman on transhipment—underwriter liable—if goods cannot be transhipped, must await instructions of owners—sale of ship by master—in extreme necessity—instances of sale not sustained—instances where sale sustained—sale must be from absolute necessity—master must forward surveys and protests—Vice-Admiralty Court abroad has no power to order sale—vessel should be broken up before sale—remarks of Sergeant Shee.

GENTLEMEN,

I have been treating of shipwreck on our own shores, and the line of conduct which, in such circumstances, you should follow, and the duties you have to perform. I will now proceed to another disaster, and assume, that you are driven by stress of weather, and sea damage, into an intermediate port,—that your cargo is damaged,—and that your vessel requires repair, in order to enable her to proceed on her voyage.

In such circumstances, it is essential for you always to consider yourself as agent for all parties, and to act as you would have done for yourself, if uninsured, or as you can honestly consider the parties themselves

would have done, if they had been present. If the damage be of any extent, it will be your first duty to have a survey of the ship and cargo made by competent persons. For that purpose, it may be necessary to unload and warehouse the cargo, and the expenses of so doing are matter of general average. You ought to forward copies of the surveys and your protest to your owners and the shippers; and, if you can hear from them within a reasonable time, you ought to await their instructions. Perhaps, the surveyors may report, that the cargo, or at least part of it, should be sold; but this recommendation you will adopt or not, according as, acting as an honest man, you consider it proper and necessary, and the best that can be done in the circumstances, for the benefit of all concerned. You should always bear in mind, that you are merely a common carrier, entrusted with the conveyance of goods,—that your paramount duty is, to convey these goods to their place of destination,—and that, unless under very peculiar circumstances, you have no power to dispose of them. If the cargo be not of a perishable nature, and will not suffer by the delay, it ought to be warehoused until the vessel be repaired, and fit to continue her voyage, and on no account should it be sold. If the cargo, or part of it, consist of manufactured goods, such as linen, cotton, or woollen, the bales must be opened and the goods dried, and such other precautions adopted as may be necessary for preventing the damage from spreading; but, if they have not been damaged, these goods can be warehoused as well as any other. If the cargo be of a perishable nature, and has been so much damaged by the sea water, as to render it unfit for carrying forward to its place of destination, then, in such a case of absolute necessity, a sale may be the proper and prudent course; as, for example,—hides were shipped at Valparaiso for Bourdeaux, and arrived at Rio de Janeiro, on their way to Bourdeaux, in a state of incipient putridity, occasioned by a leak in the vessel, and were sold there for a fourth of their value, because, by the process of putrefaction, they would have been destroyed before they had arrived at the port of Bourdeaux. In such a

case of absolute necessity, there could be no doubt of the propriety of the sale, and of the power of the master to sell.¹ But if the cargo be corn, which has been wetted by salt water, you are not to sell it in consequence, but it must be kiln-dried, so as to render it fit for being re-shipped. And, if the vessel has become a wreck, so that it cannot be repaired, then the contract with the shippers for the conveyance of the goods is at end, and you have no power to sell any part of the cargo. For instance, where a vessel, in the course of a voyage to India, was wrecked off the Cape of Good Hope, and some indigo, part of the cargo, was sold there by public auction, by the authority of the master, acting honestly, according to the best of his judgment, for the benefit of all concerned, and no fraud or improper motive was imputed to him; the indigo was described as being wet, but otherwise in good order, and the chests were not opened before the sale; the indigo was sent to this country, and the original owners were found entitled to recover its value.²

In the next letter, I will consider your power to sell part of the cargo, for the purpose of paying the expense of the repairs, and the other necessary expenses which may have been incurred at the port to which you have been compelled to resort; and, in this letter, I will afterwards consider your powers of forwarding the cargo by another vessel, to its port of destination. But, here, I would impress upon you, that, in general, you have no power to sell the cargo; your primary obligation is to forward the cargo; and, if that has become impracticable, you must either return it to the port of lading, or place it in safe keeping at the intermediate port, to await the instructions of the shipper. It must be a very perishable cargo, and in very peculiar circumstances, indeed, which will justify you in selling it; and therefore a sale must be the last thing to which you should resort, and that sale can only be justified by such a dire necessity as supersedes all human laws.³ If a sale is made without any such necessity, you and your owners will be

¹ *Roux v. Salvador*, 15th November, 1836; 3 Bing. N. C. 266.

² *Freeman v. East India Co.*, 27th April, 1822; 5 B. A. 617.

³ *Abbot*, 368.

answerable for the value of the goods ; and it will be no defence, that the sale was made under the authority of a Vice-Admiralty Court, in a British colony,—that court having no authority to order such sale ; and, besides, the purchaser who has bought at a sale made under such circumstances, will be answerable to the original owner, for the value of the goods. The following case will serve as a striking illustration of all these consequences. The master of a vessel, which had been injured by the perils of the sea, put into the Mauritius, and there abandoned the ship and the cargo, which were afterwards sold under an order of the Vice-Admiralty Court there, and the proceeds paid into that court. The cargo was neither damaged nor perishable, nor was there any pressing necessity for the sale of it ; therefore, the owners of the cargo brought an action against the owners of the vessel for wrongfully selling the cargo, in place of carrying it to London, in terms of the contract of affreightment ; and they obtained a sentence against the owners, for the value of the ship and freight, which only amounted to one-fifth the value of the cargo. They also sent out a power of attorney to an agent in the Mauritius, for the purpose of procuring from the Vice-Admiralty Court there, the proceeds of the sale, which had been paid into that court ; but these proceeds had been previously remitted to the High Court of Admiralty in England. The owners of the cargo then raised an action against the purchasers of the goods ; and, in that action, it was held, that the master had no authority to sell the cargo, although, in doing so, he was acting from an honest intention, and under the order of the Vice-Admiralty Court,—that the recovery against the owners of the ship was no answer to the demand against the purchasers of the cargo,—and the proceeds of the sale at the Mauritius not having been paid when demanded, the owners of the cargo were in the same situation, as if no such demand had been made ; and, therefore, they were entitled to recover the value of the goods from the purchasers.⁴

In treating of this subject, the late learned Chief Justice of the Court of King's Bench, in his excellent

⁴ *Morris v. Robinson*, T. T. 1824 ; 3 B. C. 196.

work on shipping, has the following remarks, which it would do well for you seriously to consider and keep in mind, should you ever be in a situation where you think it necessary, or where you may be advised, to dispose of your cargo, or part of it. He says,—“An unexpected interdiction of commerce, or a sudden war, may defeat the adventure, and oblige the ship to stop in her course; but neither of these events doth, of itself alone, make it necessary to sell the cargo, at the place to which it may be proper for the ship to resort. In these and many other cases, the master may be discharged of his obligation to deliver the cargo at the place of destination; but it does not, therefore, follow that he is authorised to sell it, or ought to do so. What, then, is he to do? In general, it may be said,—he is to do that which a wise and prudent man will think most conducive to the benefit of all concerned.”

It is a very common notion, but a very foolish one, that, when a master applies to a Vice-Admiralty Court abroad, to have a survey made of the cargo, and the surveyors recommend that the cargo should be sold, upon which the Vice-Admiralty Court grants warrant for selling it accordingly,—this warrant is a sufficient authority to the master to sell, and protects him from all the after consequences of doing so. Nothing can be more absurd. The laws of this country recognise no court abroad, that has an authority, on your own application, and at your own instance, to do what, under your authority of master, you yourself would not be justified in doing. A Vice-Admiralty Court has no authority to order a sale; and neither a report by surveyors, appointed by such a court, nor a sentence of condemnation pronounced upon that report, is conclusive evidence the absolute necessity which exists for the sale, and which alone can justify a sale by you as master. Any such proceedings may be useful for the information of the owners, or of those who, under certain circumstances, have the power of selling; but they, certainly, confer upon you no authority, and afford you no justification for the exercise of an authority which must arise from the existence of

absolute necessity, and which can be justified by that absolute necessity alone. Your primary and paramount duty is, to convey the cargo to its place of destination; for this purpose you are entrusted with it, and this purpose you are bound to accomplish by every reasonable and practicable method;⁶ and it is only in the case of an *absolute necessity*,—a necessity not merely legal, nor physical, but a moral necessity,—the test of which is, whether the circumstances are such, that a person of prudent and sound mind could have any doubt as to the course he ought to pursue,⁷—that you can take upon you to dispose of the cargo.

The extent of repairs which a vessel may require at an intermediate port, or at a port to which she is compelled to go for the sake of having repairs performed, and which, in consequence of a disaster at sea, have become necessary, in order to enable her to continue her voyage, must, of course, depend upon the damage she has received; but, the general rule is, that no repairs or necessities must be done or supplied more than are absolutely necessary,—that these must be done as expeditiously as possible,—that you must wait no longer at that port than this necessity requires,—and that you must sail again without delay.⁸ This necessarily implies, that it is only the repairs rendered necessary by the perils of the sea, and the storms and dangers the vessel has encountered, which are to be performed at that intermediate port of necessity; but, if these repairs have been rendered necessary, in consequence of the natural decay of the vessel, from age, or of her not having been properly found or provided at the outset, and not having been sufficiently tight, staunch, and strong for the voyage,—it will then be a difficult and important question, whether the insurances upon the ship and cargo are not thereby vitiated; and, at all events, the expenses incurred at that port must, in such a case, fall upon you and your owners.⁹

Although the time thus spent in obtaining these neces-

⁶ Abbot, 365.

⁷ Chief-Justice Tindal in *Soames v. Sugrue*, 1830; 4 C. P., 276.

⁸ Abbot, 364.

⁹ 2 Arn. 757.

sary repairs, is not held such a delay as will amount to a deviation, yet, if there be any unnecessary delay in getting these repairs done, this will amount to a new deviation; and after the repairs have been executed, it is not necessary to return to the point of the original voyage, from which you deviated for the purpose of repair, but you must pursue the shortest and most direct course to the port of destination, in the most expeditious manner.¹

If the repairs were rendered necessary for the general preservation and benefit of all, and from a cause which would found a general average contribution, and are merely such as were necessary to enable the vessel to proceed on her voyage, and were not afterwards to be of any lasting benefit to her,—although it is not easy to conceive a repair which would not be productive of *some* benefit to a vessel,—the expense of these repairs, deducting any benefit that may result to the vessel, including the expense of unloading the cargo to make them, are matters of general average.² Yet, where the repairs have been occasioned by the ordinary perils of the sea, as by tempestuous and adverse winds, neither the expenses of the repairs themselves, nor the wages and provisions of the crew while detained in that port, are general average.³ These latter must fall upon the owners, under their obligation to keep the vessel tight, staunch, and strong during the voyage. Of course, if the repairs are absolutely necessary, you do not require to trouble yourself as to whether the expense of these repairs is to form general average or not, or whether that expense is to be borne by the shippers and owners, or is to fall wholly upon the latter. But this you need to attend to,—not to go into a port and repair, unless absolutely necessary,—to have nothing done there but what is absolutely necessary,—and to allow of no delay in getting that done. And, besides, you must take care to obtain proper accounts and receipts for all you may expend. These, with the surveys which have been made, and the protest

¹ 1 Arn. 390; 1 Mar. 203.

² *Plummer v. Wildman*, 27th June, 1815; 3 M. S. 462.

³ *Power v. Whitmore*, 1815; 4 M. S. 141.

that you, as a matter of course, have taken on your first coming into port, you will take care, when you are ready to proceed, to forward to your owners, so as, if these expenses are the proper subjects for a general average, the different proportions may be fixed and ready for settlement, either at the port of lading, or at the final port of discharge; or if the expenses are only to be a particular average, your owners may recover from the underwriters.

In what has been said, I have assumed that your own vessel is repairable, and that, at the port to which you have gone from necessity, there are the capabilities for performing the requisite repairs. In such case, the general rule is,—that when the vessel becomes accidentally disabled in the course of the voyage, without your fault, you have the option of two things,—either to refit, if that can be done within convenient time,—or to hire another ship to carry the goods to the port of delivery; and, if the shipper disagree to this, and will not let you do so, then you will be entitled to the whole freight of the *full* voyage.⁴ And, “if the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight, unless the forwarding of them be dispensed with, or unless there be some new bargain upon this subject. If the shipmaster will not forward them, the freighter is entitled to them, without paying anything. One party, therefore, if he forward them, or be prevented or discharged from doing so, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all.”⁵

Here, then, if your own vessel can be repaired in a reasonable and convenient time, and if these repairs can be executed at the port you have gone to, you can retain the goods until your vessel be repaired,—taking, of course, all necessary care of warehousing, and otherwise attending to them in the mean time; but, if the freighter take the goods off your hands at that port, and do not

⁴ Lord Mansfield in *Luke v. Lyde*, 1799; 2 Burr. 889.

⁵ Lord Ellenborough in *Hunter v. Prinsep*, 1808; 10 East. 378.

require you to carry them on to the port of original destination, then, he is liable for the whole freight of the full voyage. On the other hand, if the freighter do not do this, so as to dispense with your performing and completing your original contract, and if you do not forward them, the freighter will be entitled to them, without paying anything.

The great question is, however, whether, when your own vessel is wrecked, or disabled from carrying on the goods to the place of their destination, by some event which you have not occasioned, and over which you have no control, you are *bound* to forward the goods in another vessel; or, having contracted to carry them in your own vessel, you are freed from the further prosecution of the voyage, by the accident which has happened, and which prevents you from accomplishing it in the literal terms of your undertaking. It would be un-instructive to enter into any examination of the different foreign laws, and opinions of foreign lawyers, on this question, because the rule adopted in this country, as stated by Lord Tenterden, and decided by the court, is, that, "if by reason of the damage done to the ship, or "through want of necessary materials, she cannot be "repaired at all, or not without very great loss of time, "the master is at *liberty* to procure another vessel to "transport the cargo to the place of destination,"⁶—if he think fit; and if the goods arrive at the place of destination, by such other conveyance, he is entitled, on the freighter obtaining the goods, to the whole freight originally contracted for, although, by the second conveyance, the goods may have been carried for less than the original freight.⁷

In delivering the opinion of the court, in the case now referred to, Lord Denman remarked,—“It may, therefore, safely be taken to be either the duty or the right “of the owner to tranship in the case above supposed: “if it be the former, it must be so in virtue of his original “contract, and it should seem to result from a performance by him of that contract, that he will be entitled to “the full consideration for which it was entered into,

6 Abbot, 365. 7 Shipton v. Thornton, 1st Dec., 1838; 9 A. E. 314.

“without respect to the particular circumstances attending its fulfilment: on the other hand,—if it be the latter, “a right to the full freight is implied,—the master is at liberty to tranship; but for what purpose, except for “that of earning his full freight at the rate agreed on? “In the case supposed, we may introduce another circumstance:—let the owner of the goods arrive, and “insist, as he undoubtedly may, that the goods shall not “proceed, but be delivered to him at the intermediate “port; there is no question but that the whole freight, “at the original rate, must be paid; and that because “the freighter prevents the master, who is able and “willing, and has the right to insist on it, from fulfilling “the contract on his part; and because, sending to their “destination in another vessel is deemed a fulfilment of “the contract. If, therefore, the owner of the goods be “not present, and personally exercise no option, still the “shipowner, in forwarding the goods, must have the “same rights, and, in doing so, must be taken to exercise them with the same object in view.” His lordship further remarked:—“It may well be that the master’s “right to tranship may be limited to these cases, in “which the voyage may be completed on its original “terms as to freight, so as to occasion no farther charge “to the freighters; and that, where the freight cannot “be procured at that rate, another, but a familiar principle will be introduced,—that of agency for the merchant. For it never must be forgotten, that the master “acts in a double capacity;—he is agent of the owners, “as to the ship and freight; and agent of the merchant, “as to the goods. These interests may sometimes conflict with each other, and from that circumstance may “have arisen the difficulty of defining the master’s duty “under all circumstances, in any but very general terms. “The case now put supposes an inability to complete “the contract, on its original terms, in another bottom, “and, therefore, the owners’ *right* to tranship is at an “end; but still, all circumstances considered, it may be “greatly for the benefit of the freighter, that the goods “should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty

“of the master to do so. *In such a case*, the owner will “be bound by the act of his agent, and, of course, be “liable for the increased freight. The rule will be “the same, whether the transhipment be made by the “shipowner or the master; and, applying it, circum- “stances make it necessary, on the one hand, to repose “a large discretion in the master or owner, while the “same circumstances require that the exercise of that “large discretion should be very narrowly watched.”

To these observations, coming from so high an authority, and so full of instruction, it would be presumption in me to add anything; and I will only observe, that where the goods have been transhipped into another vessel, in consequence of the loss of the original vessel, the underwriter is still liable to the risk on the goods, and for a loss, should one occur in the substituted ship.⁸

But, suppose it be impossible to tranship the goods,—to engage another vessel at the port of necessity, in which to convey the goods to their place of destination,—what are you to do in this case? Here, the original rule must come to your aid, and must be acted on by you, according to the best of your judgment, viz.,—to do that which a wise and prudent man would think most conducive to the benefit of all concerned. Should the cargo not be perishable, the proper course evidently would be, to place it in a warehouse, or deposit it in some other place of safe custody, to await the instructions of the owners of it, whom, I need hardly add, you must necessarily advise of your situation, and of the course which you have adopted, and what you must pursue. Whatever may be the after question between your owners and the freighters, you cannot be wrong in placing the goods in the power and at the disposal of their owners, when, in the circumstances above noticed, you are unable to fulfil your engagement to carry these goods on to their place of destination. In a previous part of this letter, I have had occasion to remark on the power you have of selling the goods,—that a sale should be the last thing to which you ought to resort,—and that it is only a case of extreme and absolute necessity which can justify you

8 *Plantamour v. Staples*, 1 T. R. 611.

in doing so. I am not here speaking of the case, where, after having in vain tried all other expedients of raising money, in the intermediate port, to pay the necessary expenses, you have of necessity to resort to a sale of part of the cargo,—that will fall under the next letter. But I here allude to a sale of the cargo made by you, apparently with an honest intention, and for the benefit of all.

I now proceed to the sale of the ship itself by the master, and to consider under what circumstances of extreme necessity, the master has a right to sell her. But, here, I do not refer to those cases in which the master is compelled to sell the vessel in a foreign port, in order to raise money for paying the necessary expenses there, which properly belong to the following letter.

It is only in cases of *extreme necessity*, that the master has any power to sell the vessel; but, “what circumstances of distress or damage will constitute such a case of urgent necessity, as may enable a master to convey to a purchaser an indefeasible title to his ship, it is more difficult to determine;”⁹ although, in general, if the master is in a place where the repairs cannot be done, or where he has no money to pay for them, and no means of raising it, then he is justified in selling,—it is a case of necessity.¹ But this necessity will be best seen from a detail of some cases, in which such a sale was not sustained, and in which it was.

Thus, in one case, the vessel had been damaged upon the rocks in Sligo Bay, and the master caused her to be surveyed by persons whom he described, but who did not appear to have filled any public station, and who reported that it would require £1500 to repair her, being a sum exceeding her value, and, therefore, that it would be for the interest of all concerned to have her sold. She was accordingly sold for £350, and, by the master's desire, the purchaser paid part of the price to the owner's agents at Sligo, and carried the remainder to account between himself and the master. Soon after the sale, the purchaser offered the master a fourth of the vessel at the same price, if he would consent to navigate her again, to which he agreed; and the vessel, after being repaired at

⁹ Abbot, 19.

¹ Tindal C. T. in *Soames*, *ut sup.*

an expense of £800, sailed to Riga, and was taken on her return thence to London, and recaptured; the agents of the original owners declared, that they had done every thing they could to prevent the sale, and had been ready to make any advances that might be found necessary. A claim was made to the vessel, on behalf of the original owners, in the Prize Court of Admiralty, and to them the ship was ordered to be restored, without prejudice to any rights, which the proper court might think the purchaser had acquired by the purchase.²

In another case, the vessel had been sent on a voyage to Jamaica, and immediately after discharging her cargo, she encountered a hurricane, and was driven on the shore of the island:—under these circumstances, the master applied to the consignee of the cargo for advice, and under his advice, he made the usual protest as to the state of the vessel, and applied to the deputy naval officer of the island for a survey, who accordingly issued his warrant to four masters of ships to examine the vessel, and make a return, upon oath, of her state and condition. They reported, that they had been on board, and found the vessel settled in a sand-bank, four feet, with a bank of sand between her and the sea of twice her length, and not more than two feet water on the sand-bank; and were, therefore, unanimously of opinion, from the great expense that would be incurred in attempting to get her afloat, and the little chance of succeeding, that it would be most for the advantage of the underwriters, and all others concerned, to sell the ship as she then lay, with all her materials:—the consignee advertised the vessel for sale, by public roup, as a *wreck*, he himself acting as auctioneer, and charging his commission; and the vessel was sold to one Dunn for about £864 sterling, although she had cost £3700 before she left England, and one of the surveyors attending and bidding at the sale. Dunn sold the vessel to a brother of one of the subsequent owners, and he, upon his oath of ownership, and surrender of her register, obtained a new register at Jamaica, and then transferred her there to three other persons,—one of them one of the four masters by whom she had

² *Fanny and Elmira*, 21st July, 1809; *Edw.* 117.

been surveyed. The vessel was got off the sand with considerable difficulty, but very little injured, and, after a slight repair, returned to England with a cargo;—and the original owners having brought an action to try the validity of the sale, it was held, that there was no such necessity as called upon the captain, acting for the benefit of the owners, to sell the ship.³

These were questions between the original owners and the purchasers from the master, as to the property of the vessel, and which fully support the principle, that it is only in a case of absolute necessity, the master has power to sell. Another class of cases has arisen between the owners and the underwriters,—the former claiming for a total loss on a sale by the master, and the principle of decision being that the loss, partial only, cannot, by a sale by the master, be converted into a total loss.

Thus, a vessel arrived at Buenos Ayres from Monte Video, on 6th October, and anchored in the roads on the following day; but, on the 11th, it was discovered she leaked very fast, and, after discharging the cargo, the vessel, after ineffectual attempts to remove her, sunk on the 12th, lying under water at high tide, but partly above it at low water; on the 18th she was sold by the advice of some masters of vessels, because the expense of raising her would probably exceed her value; but, shortly after the sale, the water in the river Plate having considerably subsided, the purchaser succeeded in raising the hulk, and expended in repairing her, about £1350, which put her in a condition for being used in coasting; although not being coppered, she could not have brought to England a cargo of hides as had been contracted for, but might have been taken in ballast or with some sort of cargo. The owner brought an action against the underwriters for a total loss; but it was held, that, the ship not being bodily and specifically lost, it could not be a total loss; and, while the ship continued in existence, nothing could make the sale a total loss, unless the sale had been made according to the best and soundest judgment which could be formed, under the circumstances which then existed.⁴

³ *Hayman v. Moulton*, 1st November, 1803; 5 Esp. 65.

⁴ *Doyle v. Dallas*, 9th February, 1831; 1 M. R. 48.

In another case, a vessel, on her voyage from Liverpool to Narva, was driven on the Thistle Rock, near Gottenburgh, which so penetrated her bottom, that the crew were obliged to leave for the preservation of their lives; after some ineffectual attempts to float the vessel off the rock, and after obtaining the opinion of several persons, that it was impossible to get her off, and that the best course was to sell her as she lay, the master sold the vessel for £18; the purchaser, in five days, succeeded in getting her off the rock, and, after she had undergone repairs, she cost the purchaser in the whole, including a sum for stores, £750, while her then value was stated to be £1200. The owner brought an action against the underwriter, as for a total loss, but the court held that, "if the situation of the ship be such, that by "no means within the master's reach, it can be treated "so as to retain the character of a ship, then it is a total "loss; if the captain, by means within his reach, can "make an experiment to save it, with the fair hope of "restoring it to the character of a ship, he cannot, by "selling it, turn it into a total loss;" and, therefore, it was held, that the owner could not recover as for a total loss.⁵

The principal cases, in which a sale by the master has been sustained, have occurred between the owners and underwriters, in which the propriety of the sale was discussed, as incidental to the question, whether or not a total loss had occurred.

Thus, in one case, the vessel sailed in a seaworthy state from Calcutta on her voyage home, when, in addition to some damage in the Hoogley, she encountered two storms at sea, by which she was so shattered as to render it necessary for her to put back to Calcutta; on arrival, the master gave notice of abandonment to the agents for Lloyd's, resident there, and requested the surveyor to be present at the surveys of the vessel; the agents had no authority to accept the abandonment, but their surveyor attended the surveys, when the vessel was found to be so seriously damaged, that the expense of repairing her would be nearly £5000; the agents refused

⁵ Gardner v. Salvador, 1st November, 1831; 1 M. R. 118.

to undertake the repairs; and the master, having in vain attempted to borrow money for that purpose, on the hypothecation of the vessel, sold her by public advertisement for £1200, as the best course for all parties; and on his return to London, the owners expressed no disapprobation of his conduct;—the owners raised an action against the underwriters for a total loss, and it being found that the captain had a justifiable cause of selling the ship, they recovered accordingly.⁶

In another case, the vessel got on the rocks in the St. Lawrence; and, on survey, it was found that the expense of repairs would exceed her value when repaired; the master sold her as a wreck, and the purchaser got her off; but on her voyage to England she was lost;—the owners raised an action against the underwriters as for a total loss, and they recovered,—the court holding that if, by any of the perils insured against, the ship become a wreck, the master may sell, and the owners can recover for a total loss, without giving notice of abandonment.⁷

In another case, the vessel was driven on shore in a violent storm, and was imbedded in the sand, and so much damaged that she could not be got off unless at a ruinous expense; the master sold her;—and the court holding, that the sale was fairly made and justifiable, found the owners entitled to recover as for a total loss, without notice of abandonment.⁸

Farther, a vessel was forced, by storms and perils of the sea, into the Isle of France to repair, the expense of which was estimated at £4000; but no assurance could be got that this would cover the expense; another carpenter estimated the cost as far exceeding her value, £8000 or £9000; and, after all, it seemed doubtful whether the repairs could be properly done there;—the captain abandoned and sold the vessel, for the benefit of all concerned,—and Chief Justice Tindal held, that a captain has no power to sell, “except from necessity, “considered as an impulse, acting merely to excuse his

6 *Bonham v. Read*, 3 B. B. 147.

7 *Cambridge v. Anderton*, 8th May, 824; 3 B. C. 691.

8 *Mount v. Harrison*, 10th November, 1827; 4 Bing. 388.

“departure from the original duty cast upon him of navigating and bringing back the vessel ;—if he has no means of getting the repairs done in the place where the injury occurs, or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is justified in selling, as the best thing that can be done. In the present case, it appeared that the vessel was in a place where the repairs could be done, and where money could be obtained, although at an extravagant expense ; still the question is, whether the expenditure was so great that no prudent man, in the exercise of a vigorous and sound judgment, would hesitate as to the propriety of selling ;—if the owner himself had been on the spot, uninsured, and would, in the exercise of a sound discretion, have repaired the vessel ; or if an agent of the underwriters had been there, and he, exercising such discretion, would have repaired, then this captain ought to have done so ; but, if they would not have done so, then, I think this captain was not compelled to repair, and the sale, in such case, will have taken place under a justifiable necessity.”⁹

And, in another case,—the vessel left the wharf at Savannah, to complete her cargo at a place about six miles from it, and, in her way, the vessel grounded upon some wrecks in the river, by which she was a good deal strained, but floated, and proceeded and completed her cargo, and sailed for England ; next day, she encountered some heavy gales, and was found to be leaky, and for two days the pumps were kept going, without any diminution of the leak, when the crew refused to work the pumps any longer ;—she then bore back to Savannah, where she arrived, after encountering more rough weather ; and, on an examination of her by two of the port-wardens, she was ordered to be discharged : surveys were subsequently made by the port-wardens and several ship-carpenters, when she was declared unfit for service, and directed to be sold for the benefit of all concerned ; and she was accordingly stripped, and sold by auction for 1200 dollars, and broken up by the purchaser ; and

⁹ *Soames v. Sugrue*, 1830 ; 4 C. P. 276.

the owners were found entitled to recover from the underwriters.¹

All these cases will show you, that it is only from absolute necessity you have the power of selling the vessel. Either the vessel must be a wreck and incapable of repair, or she must be in a place where the repairs cannot be had; or, the expense of repairs must exceed her value when repaired; or, after trying all possible means of raising money to pay for repairs, you can do so in no ways, and, as a last resource, you must sell her. In such a case, you ought, before selling, to obtain faithful and accurate surveys of the actual state of the vessel; you should take care to preserve evidence of all your procedure and applications for money, and of the steps you adopted in bringing the vessel to sale; and these, with your protest, you must transmit to your owners. It is quite unnecessary to make any application to a Vice-Admiralty Court abroad, to have a survey of the vessel under its authority, and sentence of condemnation and sale as unfit for service. Such court has no authority, upon the petition of the master, to decree the sale of the ship, reported, upon survey, to be unseaworthy and irreparable, and that sentence of condemnation will have no force in this country, without the facts, upon which it bears to have proceeded, if disputed, being again satisfactorily proved. You should also recollect, that, if a registered vessel has been deemed or declared to be stranded or unseaworthy, and incapable of being recovered or repaired with advantage to the owners, that vessel is to be taken and deemed to be a vessel lost and broken up, to all intents and purposes, and never again to be entitled to the privileges of a British-built ship, for any purposes of trade and navigation.²

In a case of necessity which will warrant a sale, the prudent course undoubtedly is, before selling, to break up the vessel, so as she can no longer retain the character of a ship, and she must be sold, utterly and truly, as a wreck, so as to avoid all disputes on the part of your owners, either with underwriters or purchasers, of which I have already given you several examples. And

¹ Thomson v. Colvin, 1 L. W. 140.

² 8 and 9 V., c. 89, § 8.

on so important a subject, I cannot do better than close this letter with the remarks of the learned editor of Lord Tenterden's work on shipping:—

“What, then, is the meaning of the rule, so frequently inculcated, that the master, in a case of misfortune to his ship, must do his best for the benefit of all concerned? A ship driven into port by sea damage, in itself but trifling, is discovered, on survey, to be in a state of general and perilous decay. The master is satisfied of her inability to complete her voyage, without extensive repairs, and that the cost of them must be such as to create a grave doubt if an immediate sale would not be more for the interest of her owners. In resolving that doubt, if he means fairly, and reasons rightly, his knowledge that the ship is insured will not influence his judgment. Fraudulent statements, or suppressions in protests and surveys, followed by a hasty sale, or extravagant repairs, may seriously affect the interests, but cannot extend the legal liabilities, of the underwriters. His duty to them is no other than the duty of an honest servant of an honest employer, to them with whom that employer has contracted. Whether he proceeds to a sale, or gives orders for repairs, he should carefully ascertain the amount of damage resulting from recent perils of the sea, and of damage attributable to other and older causes, preserving, for the satisfaction of all whose interests may be affected by his acts, the evidence which will enable them also to distinguish the one from the other, and thereby adjust their respective losses.”³

I shall now proceed to the means you have of raising money for paying the necessary expenses, which have been incurred in the port to which you have been compelled to resort.

I am, &c.

LETTER XIII.

How money is to be raised for repairs—pledging credit of owners—drawing bills on them—master obtaining repairs or money upon his own credit—drawing upon the owners—money must be absolutely necessary—and expressly borrowed for—raising money where neither owners nor master known—bond of bottomry—essentials of—if marine interest stipulated, and sea risk excluded, bond void—by whom granted—by owner—by substituted master—to whom granted—granted only in case of necessity—where granted—bonds of bottomry of great antiquity—and of a very high and privileged nature—under what necessity master can grant bond—necessity must be twofold—instances of bottomry bonds being held invalid—must be for advances made solely on security of ship—true cause of granting—marine interest—when exorbitant—good in part and bad in part—whether lender bound to see application of money—if two or more bottomry bonds, last in date preferred—when bond payable—what discharges borrower—proceedings for recovering payment—master can pledge freight also—may sell a part, or hypothecate whole of cargo—sale of part must only be adequate to occasion—must account to merchant—underwriters not liable for loss—hypothecation of whole cargo—meaning of—terms of bond of hypothecation—recovery of sum advanced—power of master to borrow—general authority—owners responsible for money borrowed—general rule as to—instances of—opinion of Lord Abinger—money must be borrowed expressly for ship—lender must ascertain necessity for expenditure—master expending his own money.

GENTLEMEN,

Let me assume, in the next place, that you are without money in a foreign port, and that you have got the requisite repairs executed,—how, then, are you to pay for these repairs?

The first and most obvious method is, to pledge the credit of your owners, by drawing bills on them for the amount of these repairs; but you should recollect, that these bills ought to be drawn for necessaries only, and that the person in whose favour you may draw such bills, must, when required, prove the actual necessity

for the supply of those things for which the bills are drawn.¹ You ought, also, to make these bills bear the precise purpose for which they have been drawn, so as, in any question between the creditor and the owners, or yourself and your owners, these bills may bear evidence of that precise purpose.²

But, if your owners are not known, and have no credit, in the port of repair, perhaps you may obtain the repairs done, or raise money, upon your own credit and responsibility. And for the money so raised and necessarily expended, you have a claim to be relieved by your owners. For such money, you have also an implied authority to draw upon your owners, either in favour of the person who has made the repairs, or of him who has advanced you the money.³ But this does not apply, to the effect of authorising you to take up an indefinite or unlimited supply of money, which, being without control, you may dissipate; and will only warrant you in taking such a supply of cash as is required by the exigency of the case, and as is absolutely necessary for paying the expenses of the repairs which the vessel may have received.⁴ And, besides, although the money has been advanced to you by a third party, and it may be proved that you have applied it to the purposes of the ship, yet your owners are not liable to that third party, unless it can be proved that the money was advanced to you expressly for the purposes of the ship.⁵ But, although you yourself should advance money for these necessary repairs, you have no lien or preference over the ship, for the sum you may so advance.⁶

So far it is plain sailing; but, take the case, that neither yourself nor your owners are known in the port to which you have been driven, and, consequently, that there is an impossibility of raising money to pay the expenses. You must, therefore, find some other security on which the lender may agree to advance money; and the first subject which presents itself is the vessel; and, as this borrowing money on the security of the ship, is

1 Abbot, 199. 2 Scott v. Miller, 23rd May, 1837; 3 Bing. N. C. 811.

3 Holt, 390.

4 Rocher v. Bushner, 1 Starkie, 27.

5 Thacker v. Moates, 11th May, 1831; 2 M. M. 79.

6 Smith v. Plummer, E. T. 1818; 1 B. A. 575.

a matter of necessity, it requires to be considered in detail, so as to make you fully acquainted with the nature of the contract.

When money is borrowed by the master, on the security of his vessel, for the necessary purposes of the ship, the security which he grants the lender is called a bond of bottomry,—on the bottom or keel of the ship,—that being put for the whole of the ship,—as a security for its repayment. It is essential to this bond, that the money be lent upon the risk of the voyage, and that the liability of the lender to the sea risks, which are the same as in a policy of insurance, appear upon the face of the bond, or can fairly be collected from it. Maritime or marine interest, according to the rate at which the parties have agreed, must also be expressly stipulated in the bond, to distinguish it from a common loan, upon which legal interest only can be taken. The bond must also stipulate, that, if the vessel is lost by any of the perils mentioned in it, the lender loses his money; but that, if the ship arrive safe, then he is to be paid back his principal, and the marine interest agreed upon, however that interest may exceed the legal rate. Therefore, where a bond, bearing to be a bottomry bond, stipulated for the marine interest, but excluded the sea risks, and was made payable at all events, within thirty days, either after the safe arrival of the vessel, or after the account of her loss,—the bond was held to be void, as, on the ground of usury, both against the ship and the person of the borrower.⁷ But, where the bond is drawn in legal form, and admitted to be entitled to payment, the parties will be bound by the terms of the agreement, and there will be no deduction made on account of the rate of exchange, as is made in ordinary mercantile transactions.⁸

A bond of bottomry may be granted by the owners, as well as by the master, where a sufficient necessity exists. And, therefore, where a bottomry bond was given for the necessities of the voyage, by an owner, who was on board the vessel, and who could not other-

⁷ *Atlas*, Clark, 27th Feb. and 18th Dec., 1827; 2 Hag. 48.

⁸ *Jane Vilet*, Tindall, 8th June, 1827; 2 Hag. 92.

wise obtain money, the bond was held valid,—the master, who was on board, but to dispossess whom an action had been instituted, being privy to and receiving the supplies as necessary, though he refused to sign the bond.⁹ But a bottomry bond, which was granted within three days of sailing, at the Mauritius, by a part-owner, who was really master, to a stranger, who took no step to ascertain whether the loan was required for the purposes of the ship, and the loan being larger than had been advertised for, while the balance in favour of the agents and consignees was small,—although, if the balance had not been discharged, they could have detained the vessel,—was held not to be valid.¹

It is not necessary that this bond of bottomry be granted by the master whom the owners themselves have appointed;—a substituted master, or a master appointed of necessity, can also grant it, provided the necessity for the loan be distinctly established. Thus, where the consignees of the cargo had advanced money for the necessary repairs of the vessel, they were held to be justified in taking a bond of bottomry for the amount, from a person whom, as a measure of necessity, they had substituted for the former master.² And a bottomry bond, given by a substituted master, to the merchant who had appointed him, was sustained, although, in the charter-party there was a stipulation that the disbursements for the ship should be made, free of commission, by the charterer's agent, not named—the bond-holder having denied that he was agent,—having never seen the charter-party, and disclaiming any knowledge of such a clause.³ Even where the owners have abandoned, a substituted master,—whether appointed by the underwriters' agent, or the owner's agent, or by both, not appearing,—can grant a bottomry bond to a holder of a collateral security, and the bond will be sustained; and in the same case, it was doubted whether, on the owner's abandonment, the substituted master had been appointed by the underwriters alone, he could not give

⁹ Duke of Bedford, Morris, 4th Aug., 1829; 2 Hag. 294.

¹ Orelia, Hudson, 15th June, 1833; 3 Hag. 75.

² Alexander, Tate, 5th March, 1812; 1 Dod. 278.

³ Rubicon, 20th March, 1833; 3 Hag. 9.

such a bond.⁴ These bonds are the creatures of necessity and distress, and the general rule is, that they may be given by masters substituted and appointed abroad, and by masters by succession,—such masters being held to be the heirs of necessity to the former masters, as to the granting of these bonds; so that, in a case, noticed in the report of the case last referred to, where there was a succession of masters, (owing to a mortality which prevailed in the West Indies,) who were appointed under different circumstances, and in different islands, and by the agents or consignees; and some of them gave bonds for repairs done, not by their own orders, but by the direction of others,—these bonds were sustained, there being nothing to impeach the integrity of the whole transaction.⁵

As to who may be the lender,—the general rule is, that any person, who is in the capacity to contract, may lend money on bottomry.⁶ It is no objection to a bottomry bond, though it be granted to the consignees of the cargo, for money advanced by them for the necessary repairs of the vessel, by a master whom they themselves had, as a matter of necessity, substituted for the former master,⁷ although there may be also a consignee of the ship at the same port, who, however, was not willing to make the advances.⁸ A bond of bottomry, given by a master to a foreign merchant, who had appointed him, was also sustained;⁹ and such a bond, given to the agent of the owner, who may think it unsafe to credit his employer, beyond a certain reasonable amount, or who has no fair reasonable expectation of being reimbursed, will be sustained.¹ And a bottomry bond, which recited, that the outward freight was insufficient to pay the just charges of the British Consul, and the necessary disbursements on the vessel, was sustained, although it was proved to have been given for the loan of money, in a great part required for payment of the consul's commission,—it

⁴ *Kinnersley Castle*, 29th Feb., 1833; 3 Hag. 1.

⁵ *The Wakefield*, per Sir C. Robinson, July, 1829.

⁶ 2 Mar. 748.

⁷ *Alexander*, *ut sup.*

⁸ *Nelson, Brown*, 2 July, 1823; 1 Hag. 163.

⁹ *Tartar*, *Thorp*, 15th March, 1822; 1 Hag. 1.

¹ *The Hero*, 2 Dod. 139.

being considered that the consul himself could have taken the bond.²

These bonds are usually granted by the master, in a case of necessity, when in a foreign country, or in a port where he has no means of communicating with his owners; and, therefore, in the place of the owner's residence, the master is precluded from borrowing money on bottomry, and granting bottomry bonds.³ But, it may be questioned, what shall be considered as "the place of the owner's residence?" It is, no doubt, considered necessary to the validity of such bonds, that they should be granted in a foreign port, although the law does not look to the mere locality of the transaction, but to the extreme difficulty of the communication between a master and his owners; and occasions may arise, particularly during the time of war, in which the different ports of the same kingdom may be as much separated, and cut off from all communication with each other, as if they were situated in the most distant parts of the globe.⁴ As, where, during the war in Spain, a Spanish vessel, on a voyage from Alicant to London, put into Corunna, a port of the same country, to repair, and the master, unknown and without credit, and having no means of communicating with his owners, granted a bond of bottomry, which was sustained.⁵ It is the opinion of Lord Tenterden, that the whole of England is to be considered, as to this purpose, as the "place of residence" of an Englishman, at least before the commencement of a voyage.⁶ Previous to the union with Ireland, it was held to be a foreign country, as to an English ship hypothecated by the master there, in the course of the voyage.⁷ But Lord Stowell doubted, whether, since the act of union with Ireland, by which it was incorporated as an integral part of the United Kingdom, this rule has not been altered.⁷ And, indeed, if the difficulty or impossibility of communication is to be taken as a criterion for giving validity to such transactions by a master, it is doubtful if any part of the

² Zodiac, Scott, 21st January, 1825; 1 Hag. 320.

³ Abbot, 154.

⁴ La Ysobel, Bozo, 25th Feb., 1812; 1 Dod. 273.

⁵ Abbot, 155.

⁶ Menstone v. Gibbons, 3 T. R. 267.

⁷ Rhadamante, Mayer, 29th Jan., 1813; 1 Dod. 261.

United Kingdom can, in this sense, be held to be a foreign port. In one case, a bond of bottomry, granted in Jersey, for the repairs and outfit of a vessel, by a person who was both master and owner, and who was designed as "of London," was sustained.⁸ As will be afterwards seen, the same principle does not apply to the master's authority for money borrowed by him, for necessary purposes, in a foreign port, where the owner has no agent, or in an English port, at a distance from the owner's residence, and where provisions and other necessities require to be provided promptly.

Bonds of bottomry are of great antiquity, and have been adopted into the law of this country, from the general maritime law of Europe. In circumstances where the master cannot procure the necessary repairs or supplies for the vessel, on the personal credit or security of himself or his owners, he is at liberty to pledge the vessel itself, as a security to the lender, and to stipulate for the payment of interest, at a high rate, which, in other bonds, granted under other circumstance, would be held as usurious. They are, therefore, of a very high and privileged nature, and were invented for the purpose of procuring the necessary supplies and repairs for vessels which may happen to be in distress, in a foreign port, where both the master and the owners are without credit, and where, were it not for assistance, which could be secured by means of such bonds, the vessels and their cargoes must be left to perish. These bonds are considered valid, upon the ground of necessity only, and the very purpose for which they were created was, the protection of the foreign merchant advancing the money, who is presumed to be an entire stranger to the owners, and to have no means of judging of their solvency, as with them he has no communication, and has nothing to look to for his security, but the visible property of the vessel, in his place of residence.

It is only in a case of necessity, that the master is warranted in borrowing money on the security of a bottomry bond, or in granting such a bond for repairs or supplies. The general rule is, that "an unprovided

⁸ *Barbara*, Chegwin, 1st July, 1801; 4 Rob. 1.

necessity" is essential to the validity of such a bond; and, therefore, the want of this necessity will render the bond void, even against an innocent and honest lender, who may be ignorant of all the circumstances.⁹ The right of the master to take up money on bottomry is matter of strict law, arising out of an unforeseen necessity; and, as he is not the owner of the ship, much less of the cargo, he cannot bind either the owner or part-owner of this property, or give one creditor a preference over another, unless in the special circumstances of necessity, and for the general interest of all parties in the protection and preservation of the whole. It is, therefore, a vital principle of these bonds, that they must have been granted and taken, where the owner was known to have no credit,—no resources for obtaining necessary supplies. It is this state of unprovided necessity that supports these bonds, and the absence of this necessity is their undoing. If the master takes the money from a person, who knows that he has a general credit in the place, or, at least, an empowered consignee or agent willing to satisfy his wants,—the giving of a bottomry bond is a void transaction, not affecting the property of the owner, only fixing loss and shame on the fraudulent lender. But, where these bonds have been honourably transacted, under an honest ignorance of this fact,—an ignorance that could not be removed by any reasonable inquiry,—it is the disposition of a court of law to uphold such bonds, as necessary for the support of commerce in its extremities of distress, and, as such, they have been recognised in the maritime codes of all commercial nations and ages.

The foregoing paragraph contains the substance of the opinions of the late learned judges of the Admiralty Court of England,—Lord Stowell and Sir John Nicholl,—as to the necessity which will authorise the master to take up the money on bottomry. The bond must be granted by the master acting as such, and within the scope of his authority, for the purpose of supplying "an unprovided necessity;" and the necessity must be twofold,—first, a necessity of obtaining repairs or supplies

⁹ Prince George, Shaw, 2nd May, 1837; 3 Hag. 376.

in order to prosecute the voyage,—and, second, the impossibility of obtaining these repairs or supplies in any other way than by the hypothecation of the ship.¹ So that, to authorise the master thus to borrow, this necessity must arise in the course of the voyage, and the money must be borrowed for the purpose of continuing it. It must be, generally at the least, in a foreign port where the repairs or supplies have become necessary; and the master's powers of borrowing on bottomry must arise on account of his having no other credit, or means of obtaining money upon the credit of the property.²

Therefore, where the master of a vessel freighted and insured from London to Calcutta, and back, employed as agents at Calcutta, a firm, upon which he had a limited credit to complete a return cargo;—he exhausted that credit, and took a cargo, under their advice, to the Mauritius;—and, in a series of voyages, in defiance of letters from his owners, to return home, came back to Calcutta, chartered to the same firm, who, on a fresh cargo to the Mauritius, received the freight, and, for a small balance, took a bottomry bond, without premium; it was held, that, except as to the letter of credit, this firm had acted as the agents, and on the credit of the master; and, as there was shown no absolute necessity for the bottomry bond, to secure the return of the ship to England, that the bond was invalid.³ And where a bottomry bond was given, at Hobart Town, by the master, under a threat of arrest, by the agent for the owners, for whose benefit, at least in part, the bond was entered into, on the day before the vessel sailed; and the bond recited, that it was to enable the master to “pay for necessaries supplied for the intended voyage, “and for the use of the brig;” that bond, however, not having been previously conditioned for, was also held invalid.⁴

It is also essential to the validity of a bottomry bond, that the advances must have been made upon the exclusive security of the ship, and that no other security has

¹ Horsey, Grimwood, 27th Nov., 1837; 3 Hag. 409.

² Prince of Saxe Cobourg, 12th May, 1837; 3 Hag. 392.

³ Reliance, Hays, 8th June, 1833; 3 Hag. 66.

⁴ Horsey, *ut sup.*

been held out to the lenders;⁵ and, therefore, a bottomry bond will not cover advances made upon the security of the master, nor upon bills drawn by him upon his owners; although, if a bottomry bond has been originally contemplated, it will not be injured by bills being taken at the same time, by way of collateral security.⁶

But, where bonds of bottomry have been granted, in circumstances of real and absolute necessity, and for legitimate purposes, they are to be liberally protected; and, as being granted for the benefit of commerce, the courts in this country will uphold them with a very strong hand.⁷

The true cause of granting a bond of bottomry, as given by the writers on maritime law, is, that it must be granted in a case of necessity, and for necessary repairs or supplies, for the purpose of preserving the ship and cargo; and, under supplies, it has been held, that sea stores, furnished to a vessel carrying passengers, and appropriated to the subsistence of the passengers, are included, and that these sea stores are objects of a bottomry bond.⁸ It follows, that the master cannot grant a bond of bottomry for any private debt of his own.⁹

It has been already stated, that, where money has been advanced upon the security of the vessel, and a bond of bottomry taken, the bond stipulates for a high rate of interest, and this rate must necessarily vary, like the premium of insurance, according to the agreement of parties and the risk to which the lender will be exposed. But where the interest stipulated for in the bond, is exorbitant, or where the bond is affected with fraud or collusion, or with the vice of extortion, the Court of Admiralty will interfere, although with the utmost caution, in reducing the rate of interest to what is fair and reasonable in the circumstances.¹ And, although a lender on bottomry may insure the amount

5 *Augusta*, De Bluhn, 15th June, 1813; 1 Dod. 288.

6 *St. Catherine*, 15th Nov., 1835; 3 Hag. 250.

7 Lord Stowell, in the *Alexander*, *ut sup.*

8 *Duke of Bedford*, *ut sup.*

9 *Abbot*, 160.

1 *Cognac*, 15th Feb., 1832; 2 Hag. 388.

lent in a separate policy, on his own account, yet, it is illegal to include in the sum, for which the bond has been granted, a charge of insurance on the money advanced to the master on bottomry.² But the general rule is, that the court will not look closely into the various items covered by a bond of bottomry, when the necessity and the want of other means are proved, and no fraud or collusion is alleged;³ and, even though a bottomry bond is found to be bad in one part, that does not vitiate the rest of the bond.⁴

It has been made a question, whether the person who lends the money to the owner or master, is bound to see, that the money so advanced by him is properly applied to the purposes of the vessel, for which it was borrowed. One thing is certain, as already mentioned, that the lender must satisfy himself, by reasonable inquiry, of there being an unprovided necessity for which the loan is required; and, in one case, a bottomry bond was held not valid, which had been granted at the Mauritius, within three days of the vessel's sailing, by a part owner, who was, in truth, the master at the time, to a stranger, who, previous to advancing the money, took no step to ascertain whether the loan was required for the purposes of the ship,—that loan being larger than had been advertised for, and the balance in favour of the agents and consignees being small, though, in the event of that not being paid, they could have detained the vessel until that balance had been discharged.⁵ In that case, Sir John Nicholl observed, “It may be a question, whether a lender on bottomry is bound to see to the application of the money he advances; but it is clear, that he must make due inquiry to ascertain that a necessity exists, and that without money, so advanced, the ship cannot proceed on her voyage. When a necessity has been ascertained, the lender may not be required to see to the application of the loan; but, when a ship has arrived with a considerable cargo, in a foreign port, and remained there for some time,—in the instance of

² Bobbington's, Noy., 26th Nov., 1833; 2 Hag. 422.

³ Calypso, Phalp, 15th February, 1834; 3 Hag. 162. ⁴ Tartar, *ut sup.*

⁵ Orelia, *ut sup.*

"the vessel in question, for two months,—and where the repairs have been unimportant, and all the stores previously furnished, and a person then advances money "on bottomry, without seeing the necessity,—he does it "at his own risk." But, if the money has been fairly and honestly advanced, in a case of absolute necessity which justifies the master in obtaining the loan, his subsequent misapplication of it will not deprive the lender of the benefit of his security;⁶ nor, where the necessity exists, the lender does not require, before advancing the money, to calculate the expediency of incurring the expense of the repairs; he does not need to judge whether it may be for the owner's advantage or not, to give the vessel the repairs.⁷

Where two or more bottomry bonds have been given, in the course of a voyage, under the pressure of necessity, in a foreign port, where the master or owners have no personal credit, and no other means of raising money, or procuring supplies for the repairs of the vessel, the rule is, that the bond last in date is entitled to be first paid, upon the principle, that the necessity for the last loan must have arisen out of the destitute state of the master, and his inability to procure the necessary supplies for his vessel, on the personal credit and security of himself, or his employers, and because it is held, that the last loan furnished the means of preserving the ship, and that without it, the former lenders would have entirely lost their security.⁸

It is always a stipulation in a bottomry bond, that the sum lent with the premiums, or maritime interest, is to be paid, in a certain number of days, after the vessel arrives at her moorings in the port of discharge mentioned in it; but, if there be a total loss of the vessel by the perils of the sea,—not such a total loss as would render an underwriter liable, under a policy of insurance, but an absolute and utter destruction of the ship,—the granter will be discharged: and so it has been held, where a lender on bottomry effected an insu-

⁶ *The Gratitude*, Mazolla, 13th December, 1801; 3 Rob. 207.

⁷ *The Vibella*; 1 W. Rob. 1.

⁸ *Rhadamanthe*, *ut sup.* *Eliza*, Weddell, 15th June, 1833 3 Hag. 37

rance of the sum so lent,—that he could not recover against the underwriters, unless there has been an actual total loss of the ship; for, if the ship be existing in specie, in the hands of the owners, though under circumstances that would have entitled the insured on the ship to abandon,—this will prevent it from being an utter loss, within the meaning of the bond.⁹

If the money should not be repaid, with the maritime interest, within the time specified in the bond, the lender can proceed against the ship, in the Admiralty Court, and against the person of the borrower, in the courts of common law, in England; and in Scotland he can proceed both against the ship and the person, in the Court of Session, or the court of the judge ordinary of the bounds within which the borrower resides, and to which the vessel belongs. If the money be not paid when the sea risk is ended, then the common interest begins to run upon the principal sum lent, but not upon the maritime interest;¹ although this is allowed by the United States of America.²

Where the master, in a case of necessity, can pledge the ship for a loan taken up by him on bottomry, he can also pledge the freight to become due. And even the freight of a subsequent voyage may, under certain circumstances, be liable to the lender on bottomry for the sum in the bond. As, where a vessel was about to sail on a voyage from Baltimore to Cork, and a bond of bottomry was granted in general terms, binding the ship and her freight; the vessel did not sail on the intended voyage to Cork, but sailed on a voyage from Baltimore to Dublin, and, from that port, sailed on a second voyage to America, and then to London, where she was arrested by the bondholder;—and it was held, in these circumstances, that he was entitled to have the freight of this last voyage applied to the sum in his bond.³ It has been held also, that freight, held by the sub-shippers of goods, by permission of the charterers of a whole ship, is liable, as against them, in payment of a bottomry

⁹ *Thompson v. Ro. Ex. Ass. Co.*, 26th Jan., 1813; 1 M. S. 30.

¹ 2 Mar. 755. ² Arn. 1340.

³ *The Jacob, Bear*, 31st March, 1802; 4 Rob. 205.

bond, given at the port of the charterers, for advances made subsequent to the charter-party.⁴

But, put the case, that you can find no one who will advance money on the security of the ship and freight,—what then are you to do? In such a case of necessity, or where the security of the ship and freight are considered insufficient for the amount of the sum advanced, or the expense of repairs, &c., necessarily required, the rule is, that you have power to *sell a part* of the cargo, or to hypothecate the whole.⁵

In a case of necessity, it must be obvious to common sense, that it cannot be for the benefit of the cargo, nor can it be a discharge of your duty, to convey that cargo to its place of destination, for you to sell *the whole*. The law allows you to sell a *part*, and although it has not fixed what that part should be, nor imposed any restraint, nor fixed any limitation to the extent of that part, yet, it is evident, that that part must only be adequate to the necessity of the occasion which authorises you to sell. In this case, the general rule must always be before you,—that you can only do that which a wise and prudent man would think is most conducive to the benefit of all concerned. And you should recollect, that, if the vessel reach her place of destination, you or your owners must account to the merchant for the clear value for which the goods might have been sold at that place; or, if he pleases, he may take the sum for which the goods have actually been sold, and which he can deduct from the freight for the rest of the cargo, even though the owner may have assigned that freight to a third party;—although, if, after leaving the port of necessity, the vessel and cargo on board should perish before reaching the port of destination, the general and better opinion seems to be, that the merchant has no claim for the value of that part of his goods, which may have been sold from necessity.⁶ In any case, however, where a vessel is under the necessity of putting into a port to repair, and, in order to defray the expenses of these repairs, and having no other means of raising the

⁴ The *Eliza*, *ut sup.*

⁵ Lord Stowell, in the *Gratitudine*, *ut sup.*

⁶ Abbot, 372.

money, the master sells part of the cargo, and applies the proceeds in the payment of these repairs, the underwriters upon the goods are not answerable for that loss,—the sale of these goods having been rendered necessary, not by any of the perils insured against, but merely by the inability of the master to raise money in any other way, to pay for the repairs of the vessel.⁷

The same law which permits you, in the case of necessity, already assumed, to sell a part of the cargo, also authorises you, in such a case of necessity, to hypothecate the whole cargo, as a security for the advances made to relieve the vessel from that necessity. The meaning of hypothecation is, that it “imports a “pledge without immediate change of possession, in “which the possession of the thing pledged does not “pass to the creditor; it gives a right to the party who “makes advances upon the faith of it, to have the possession, if his advances are not repaid at the stipulated “time; but it leaves to the proprietor of the things that “may be hypothecated, the power of making such “repayment, and thereby freeing them from the obligation.”⁸ In the bond, by which the master hypothecates the ship and cargo, he acknowledges to have received the principal sum advanced, on the security of the hull, keel, and appurtenances of the ship, and of the cargo of the same, on which the lender had effectually invested it, and he binds himself, within a certain period after arrival at the destined port, to repay the principal, and the premium of risk and sea exchange at the agreed on rate; in consideration of which premium, the lender agrees to run the enumerated sea risks on the hull, keel, and cargo and appurtenances of the ship during the specified voyage; and, for the more ready repayment of the principal and premium, the master binds himself and his effects in general, and, by special mortgage, the cargo and freights due, or that may become due.

Under a bond of hypothecation, in the above terms, the ship and freight are usually the first parts of the

7 *Powell v. Gudgeon*, 19th Nov., 1816; 5 M. S. 431. *Sarquay v. Hebson*, 2nd June, 1823; 2 B. C. 7.

8 *Abbot*, 366.

security which a lender will render available for his payment; and, therefore, it will only be the balance of the sum advanced, left unpaid from these sources, for which the cargo will be liable. But, even although the cargo should be made more immediately answerable to the lender, and he should recover from it the whole amount of his security, yet the ship and freight are also liable in contribution, for the sum thus realised from the cargo, to the extent of their value.

Before concluding this letter, it may be proper to say a few words, on the authority of the master to pledge the credit of his owners for money borrowed by him.

To the public, the master appears as the agent of his owners, in places where they do not reside, and have no established and known agent, and very often, also in the place of their residence, in all matters connected with the usual employment of his vessel, and the means of so employing her,—as fitting her out, victualling, and manning her; and, for the debts contracted in doing which, the owners are liable; and, although it be a condition in a charter-party, that the charterer is to supply cash to the master for disbursements, for which the master is to draw bills on his owners, and the charterer, through his agent at the outport, supplies goods for the use of the crew, and pays money demands on the master, for the amount of which no bills are drawn, as was agreed on, but he advances no actual cash,—yet the owner is liable to the charterer for the amount, because, independently of the special stipulation in the charter-party, the master has authority to obtain supplies of goods and necessaries for the use of the ship.⁹ This authority of the master is, however, subject to the restriction, that it must be made to appear the supplies furnished upon the master's order, are reasonably fit and proper for the occasion; and, under the same restriction, the master may borrow money in certain circumstances, in order to purchase what, at the time, appears to be wanting for that purpose; and for the money so borrowed, he can pledge the credit of his owner, and the owner will be personally responsible to

⁹ *Weston v. Wright*, 22nd June, 1841; 7 M. W. 396.

the lender. In such a case, the rule has been stated to be, that "the money supplied must not be understood of an indefinite supply of cash, which the master may dissipate, but such as is warranted by the exigency of the case, as for the payment of duties, or other necessary purposes."¹

Upon this principle, it has been held, in the case of a vessel, which had been engaged, and absent four years and a half in the transport service,—having arrived in the port of Portsmouth, where she received orders from the transport board to proceed to Deptford;—the master borrowed money to pay the seamen's wages,—Portsmouth being a port of discharge,—and to pay tradesmen's bills for articles supplied for the ship's use there;—and the lender obtained a verdict or decree against the owner, to the extent of the sum borrowed for the seamen's wages.² In another case, a coasting vessel—the owners of which resided in North Wales—was at Cardiff, in Glamorganshire, and the master borrowed money for the necessary use of the ship, and for the sum so borrowed the owners were found liable.³ The opinion delivered by the Chief Baron, Lord Abinger, when the case was heard in the Court of Exchequer, is so valuable and full of instruction, that I need make no excuse for enriching this letter with it.

In delivering the judgment of the court, Lord Abinger said,—“Under the general authority which the master of a ship has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself interfere, as in a home port, or in a port in which he has before-hand appointed an agent, who can personally interfere to do the things required. Therefore, if the owner, or his personal agent, be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless personally authorised, or unless there be some custom of

¹ Lord Ellenborough, in *Rocher v. Buaher*; 1 Stark. 27.

² *Robinson v. Lyall*; 7 Price, 592.

³ *Arthur v. Barton*, H. T. 1840; 6 M. W. 188.

“trade authorising it, pledge the owner’s credit at all, but must leave it to him or his agent to do what is necessary. But, if the vessel be in a foreign port, where the owner has no agent, or, if in an English port, but at a distance from the owner’s residence, and provisions or other things require to be provided promptly, then the occasion authorises the master to pledge the credit of his owner. But, then the farther question arises,—for what things he may pledge that credit? This also is limited to such things as are necessary, or, as both Lord Tenterden in his book of the law of merchant ships and seamen, and Mr. Justice Story, in his valuable work on agency, very clearly lay it down, to such things as are reasonably fit and proper for the ship or the voyage, under the circumstances of the case. But, if repairs are needed, it is admitted that he may pledge his owner’s credit for them; but repairs are only instances of the rule. If, therefore, money be necessary, it may be raised upon credit. In the case cited, *Robinson v. Lyall*, (as above,) this was done. There, without money, the wages of the seamen could not be paid, and, unless they were paid, the seamen might have refused to assist in the farther management of the ship. So, also, it may be necessary, in some cases, to pay harbour dues, or pilotage, or the like, and to pay them in ready money; and if that be the case, and the prosecution of the voyage cannot take place till they are discharged, then, also a necessity for having money in specie may arise; and, if so, the master would be authorised, under his general power of doing all things necessary for the due prosecution of the voyage, to procure money by loan, and to bind the owner by a contract for that purpose. It is not doubted that, in a foreign port, where the owner has no agent, this may be done; and we think that all these questions are referable to one general principle, although, when it is applied to a case like the present, it will require stronger circumstances to establish the fact of the necessity upon which the liability of the owner must depend.”

To so high an opinion, it would be presumption in

me to add; and I will only notice, that although the master has power to borrow money, the owners will not be liable for it to the lender, unless it has been advanced expressly for the use of the ship, even although it may have been expended by the master for that purpose.⁴

But it is necessary that the lender should ascertain, and be able to prove, that there is a necessity for the expenditure which the loan is required to defray; and also, that the money so procured in loan has been necessarily expended for these purposes; because, unless it can be proved that the money was borrowed for the necessary purposes of the vessel, and has been necessarily expended by the master for these purposes, the owners will not be liable for it.⁵

Should the master, in place of borrowing money from a third party, expend his own money for the benefit, or in the necessary purposes, of the ship, the owner is liable to repay him.⁶

So much of the master's power of raising and borrowing money, and the modes he has of doing so. In the next letter, I proceed to another incident of a voyage.

I am, &c.

⁴ *Thacker v. Montes*, 11th May, 1831; 2 M. M. 79.

⁵ *Carey v. White*, 1710; 1 Brown's P. C. 284.

⁶ *Abbot*, 139.

LETTER XIV.

Collision—from neglect—or violence of elements—Lord Stowell's division of possibilities, under which may occur—without blame—where both to blame—fault of sufferers—or fault of other party—from physical causes—where both vessels to blame—from the fault of one vessel—rules of the sea—in rivers—in going in or out of port—as to steam vessels—Trinity House order—of binding authority upon steam vessels—rule for apportioning damage—when both in fault—when one only, and she injured—preparation made against coming danger—if damage from neglect of vessel injured—must fall on owners—evidence in case of collision—one vessel only in fault—vessel under charge of licensed pilot—opinion of Sir John Nicholl—employment of pilots—when compulsory or optional—damage from a peril of the sea under policy—underwriters not liable for sum paid to other vessels—nor for wages and maintenance of crew—cargo lost or damaged—must be included in contribution—owner of, can pursue owner of vessel in fault—cargo not liable—claims between ship and cargo—if collision happen through negligence, &c.—owners of ship liable to owners of goods—if not, not liable—responsibility of owners and masters.

GENTLEMEN,

I now come to another danger incident to vessels at sea, in rivers, or in harbours; and which, whether a vessel be at sea or at anchor, or whether she be under the charge of a licensed pilot or not, will require the utmost vigilance, attention, and outlook, on the part of you and your crew, to avoid or prevent; I mean an injury by collision, or one vessel driving against or running foul of another.

It would be too much to say, that every accident arising from collision is to be attributed to the carelessness, neglect, or ignorance, or want of precaution, of one or both of the parties; but it is not going too far to say, that, at least, two-thirds of such accidents arise, if not wholly, at least chiefly, from a want of that proper knowledge, vigilance, and precaution, which should at

all times be exercised, and that a very small portion of such accidents are referable solely to the violence of the elements, over which man has no control. It was held by Lord Stowell, that there are four possibilities under which an accident by collision may occur. In the first place, it may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other greater force. In that case, the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise, where both parties are to blame, where there has been a want of due vigilance or of skill on both sides. In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party, and then the rule is, that the sufferer must bear his own burden. Lastly, it may have been the sole fault of the ship which ran the other down, and, in this case, the injured party would be entitled to an entire compensation from the other.¹

Where the accident arises from physical causes,—as from the violence of the winds or seas,—from the effects of a hurricane, a storm, lightning, or other natural causes, which human prudence could not guard against—and in no degree from the act of man,—it is held to be the act of God; as, if the vessel were, by the violence of the wind, or of a storm, driven from her moorings, and coming in collision with another vessel, sink her, or be sunk herself,—neither ship being to blame, this must be taken to be one of the perils of the sea, and the suffering party must bear his own loss.

Should both vessels be to blame, the rule is, that the damages to both, or either, must be apportioned equally, without regard to the value of the vessels, or their cargoes; but, in determining the question of blame, there falls to be considered, the established rules of the sea,—the usages and regulations of particular ports and rivers,—the state of the wind,—the tide,—the extent of

1 Woodrop, Sims, 21st November, 1815; 2 Dod. 84.

light,—the degree of vigilance and precaution exercised by the masters and crews, and all other circumstances bearing upon the conduct and management of both vessels. It is a general rule, however, that the masters of both vessels must exercise ordinary care and caution, as no man is at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it,—if he himself do not use common and ordinary caution to be in the right.²

When the collision arises from the fault or negligence,—actual, possible, or presumed,—of the one vessel, without any fault or negligence being attributable to the other vessel, the clear rule, arising from a proof of the fault or negligence, is, that the wrong-doing vessel must bear the loss.³ But, if it is impossible to ascertain to whose fault the collision is imputable, or by whose fault or negligence the injuries have been occasioned, then the whole amount of the injuries must be ascertained and borne equally by each vessel.⁴

There are certain rules of the sea, which are sanctioned by the Court of Admiralty, and which, if not positively established, have considerable influence on the determinations of that court. The vessel having the wind free, must take the proper measures to get out of the way of a vessel close-hauled; and should an accident happen, it must be proved that the vessel actually did so.⁵ As, where a vessel, having her course free, ran down a barge, beating up the river with a westerly wind,—she was held liable in damages and costs.⁶ When vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack is to persevere in her course, while that on the larboard is to bear up, or keep more away from the wind; and, therefore, where a vessel, with the windbeam on her larboard tack, ran foul of and sank another vessel, close-hauled on the starboard tack, the former was condemned in damages and costs.⁷ And where two vessels are beating to windward on opposite tacks, it is the duty of the vessel

² Abbot, 238. ³ *The Ligo, Ligo*, 19th April, 1831; 2 Hag. 356.

⁴ Abbot, 230.

⁵ *The Chester*, Lawson, 5th Feb., 1836; 3 Hag. 316.

⁶ *Baron Holberg*, Blom, 5th Nov., 1835; 3 Hag. 244.

⁷ *Woodrop*, *ut sup.*

on the starboard tack to continue her course, and of the one on the larboard to give way.⁸

It is the invariable rule and practice, by all classes of vessels navigating rivers, to take every advantage of the tide, which the localities of such rivers may afford; and, in conformity with such rule or practice, vessels going with the tide down the river Thames, keep in mid-channel, for the purpose of getting the benefit of the tide; and vessels coming up the river, against the tide, keep as near as may be to one or other of the shores; and, when so coming up the river, in Halfway Reach, by reason of the ebb tide then setting towards the north or Essex shore, keep on the south or Kentish shore, for the purpose of avoiding, as much as possible, the strength of the tide.⁹

In order to guard against the danger of collision, the following reasonable rules should be attended to by masters. When two ships are to enter into the same port, the farthest off must wait until the other has got in; and, in case of collision, the one that has arrived last, is answerable for the damage, unless the master prove that he was not in fault. If two vessels meet, the smaller must give way. A vessel going out of harbour must make way for one coming in. When a collision takes place between two vessels, both leaving a port, the one that went out last is to be deemed to have run against the other.¹

As to steam vessels, the rule is, that, from their greater power, and being always under more immediate command, they must give way; and, where a steam vessel had seen another vessel about five miles off, but the other vessel had not seen the steam vessel till just before the collision against the latter, the steam vessel was found liable in damages and costs, although, had the steam vessel followed the rule of navigation, the accident could not have happened.² Where a steam vessel was coming up the Thames on the Kentish shore, distant about one-half of the whole breadth of the reach, the

8 *Jupiter*, Henck, 5th February, 1836; 3 Hag. 320.

9 *The Friends*; 7 Jur. 307.

1 *Abbot*, 238.

2 *Shannon*, Pennefather, 20th April, 1838; 2 Hag. 173.

night being dark, the tide ebbing, and the wind blowing strong from the west, she observed a vessel coming down the river, just open over the starboard bow, and, as soon as the vessel was reported, the helm of the steam vessel was put to starboard, in belief that the sailing vessel would keep down the mid-channel, in order to go down with the strength of the tide;—it was held, that the steam vessel did wrong in putting her helm to starboard, and that the sailing vessel conducted herself properly.³ And where a steam vessel, going in a fog, with unabated speed, in a track frequented by coasters, and which did not, when hailed, order her engines to be stopped, and a collision ensued,—the steam vessel was found liable in the amount of the damages and expenses.⁴

The following order was, on the 30th October, 1840, published by the Corporation of the Trinity House, which, although it has not of itself the force or authority of a law, is a rule to be observed:—"The recognised rule for sailing vessels is, that those having the wind fair shall give way to those on a wind; that when both are going by the wind, the vessel on the starboard tack shall keep the wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand; that, when both vessels have the wind large, or abeam, and meet, they shall pass each other in the same way on the larboard hand, to effect which two last-mentioned objects, the helm must be put to port; and, as steam vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind, on either tack, it becomes only necessary to provide a rule for their observance, when meeting other steamers or vessels going large. When steam vessels, on different courses, must unavoidably or necessarily cross so near, that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other."

This rule, the present learned judge of the Court of

³ *The Friends, ut sup.*

⁴ *The Perth, Spink, 13th January, 1838; 3 Hag. 414.*

Admiralty has declared, "in all future cases the court "would consider of binding authority upon the owners "of steam vessels, and that the masters of steam vessels "not complying with it, would be considered guilty of "unseamanlike conduct, and their owners held respon- "sible for the consequences of their disobedience.⁵

It has been already mentioned, that, where both vessels are in fault, the damage done to both or either, is to be equally divided between the vessels, and not proportionably, according to the value of each ship and cargo. This was solemnly decided by the House of Lords, in a case where a vessel had made her way into the Frith of Forth, and, in consequence of the state of the weather, had come to an anchor in the fairway, at some distance from the island of Inchkeith, and, during a very blowing night, while she was in this position, but without any light in her binnacle, she was run down by another vessel, which, when she saw the vessel lying at anchor, put her helm hard down, in place of hard up, and the other vessel and her cargo were sunk;—both vessels being in fault, were found equally liable in the damage of the vessel and cargo sunk and lost.⁶ And, it is a matter of no moment that one of the vessels is more in fault than the other, and, if one vessel only is in fault, and she alone is injured, the owners cannot recover anything from the other, although, if the master of the other vessel be anyways blameable for not rendering assistance, he may be liable to the other vessel in the expenses of any action that may be brought.⁷ But if the master makes every preparation against the coming danger, it is not sufficient to subject him in damages, that, in the moment of danger, he did not make use of every means which might appear proper to a cool spectator.⁸ If, however, the damage has arisen from the neglect or fault of the vessel injured, the owners must bear their own loss.⁹

The real cause of the collision is often very difficult

⁵ *Duke of Sussex*; 1 W. Rob. 274.

⁶ *Hay v. Le Neve*, 15th June, 1824; 2 Shaw's Ap. C. 395.

⁷ *Celt, Taylor*, 16th February, 1836; 3 Hag. 321.

⁸ *Burns v. Stirling*, 1st March, 1819; 2 Mur. 97.

⁹ *Ligo, Ligo*, 19th April, 1831; 2 Hag. 356.

to be discovered, owing to such accident happening so frequently in the darkness of night; or it is accompanied with so much confusion or agitation, or attended with feelings of irritation or self-interest, which poisons the sources of evidence. It was remarked by a learned judge of the Court of Admiralty, that "it frequently happens in cases of this kind, that there is a great discordance of evidence as to the facts upon which the court has to form its decision. The testimony of the witnesses is apt to be discoloured by their feelings, and the interest which they take in the success of the cause; and the court too frequently has to decide upon great diversities of statements,—as to the courses the vessels were steering, or the quarter from which the wind was blowing at the time."¹ But the crew of the vessel charged with committing the damage are to be admitted as witnesses, on the ground of necessity, and because no other evidence could be expected; although, when they are sharers in the profit and loss of the voyage, they cannot swear that they are not interested in the result.²

It has been already said, that, where both vessels have been in fault, the whole damage must be borne equally by the owners of both; and if the vessel injured was alone to blame, or, if the collision was attributable to a neglect on her part, the owners must bear their own loss. But, if one of the vessels is solely in fault,—as, where the vessel producing the collision having the wind free in daylight,—the course taken by her was voluntary, and there was, at least, a hazard unnecessarily occasioned by the fault of those on board,³—the owners will be liable to the extent and value of their vessel. If, however, the damage arises purely from accident, or physical causes, or the act of God, as it is called, the loss must rest where it falls.⁴

Nor does the employment of a licensed pilot in the least detract from the responsibility of the master. Even although the vessel is under the charge of a

¹ Lord Stowell, in the *Woodrop*, *ut sup.*

² *Catherine of Dover*, Davison, 21st March, 1828; 2 Hag. 145.

³ *The Thames*, Drummond, 1803; 5 Rob. 343. ⁴ *Woodrop*, *ut sup.*

licensed pilot, and is sailing according to his directions, still the owners are responsible for any damage occurring under his mismanagement.⁵ No doubt, by the general pilot act of England, the master is not liable for any loss or damage which may happen from, or by reason of, a licensed pilot being on board, unless it can be proved, that the want of a duly qualified pilot has arisen from the refusal or neglect of the master, or from not heaving to, or using all practicable means to obtain a pilot.⁶ But, even although the vessel be under the charge of a regular licensed pilot, the question still remains,—why should the master, in the case of a seen evil, or of an impending accident, not interfere? I cannot do better than quote the words of Sir John Nicholl, in a case in which a foreign vessel was found liable for the full amount of the damage arising from a collision, for which he was alone to blame, notwithstanding of the provisions in the English pilotage act. He remarked;—“Did the accident arise from the neglect, “default, incompetency, or incapacity of the pilot? or, “was the master equally in fault? It occurred from “the vessel going on in the fog,—not from an act of “bad steerage, want of knowledge of shoals, or any incapacity as pilot,—but from proceeding at all. It “seems to be nearly admitted, that, if the vessel had set “off in this fog, blame would have been imputable to “the master; if so, was he not blameable in going on “in the fog? Had he not a right to resume his authority? Did he not owe it to his owners, and to other “persons whose property might be damaged by a collision, to insist on bringing the vessel up? Was not “the master in duty bound, at least to remonstrate with “the pilot, and to represent the danger of proceeding? “Yet, he says in his affidavit, he did not in the least interfere. In this aspect, the case is, as far as I am “aware, new, and one of too much difficulty to arrive at “any hasty decision upon, unless there be no other “points upon which the case may be disposed of.”

⁵ *Neptune the Second*, 29th November, 1814; 1 Dod. 407.

⁶ 6 George 4, c. 125, § 53.

⁷ *Girolemo, Guernavich*, 21st November, 1834; 3 Hag. 169.

Although, therefore, where a pilot is in charge of the vessel, in cases where, either under the general pilotage act of England, or under local acts of parliament, the master is bound to employ a licensed pilot, the vessel may not be considered as under the charge and management of the master or crew, so as to render the owner responsible in case of collision, yet if, in any case, the master has his option or choice, of taking a licensed pilot or not,—a pilot, taken under these circumstances, is to be considered as truly the servant of the master and owners, and the employment of such ought not to free them from responsibility.⁸ It depends upon the terms of local acts, commonly, under what circumstances, and at what places, it is the duty of the master to take a pilot; but, whether there be a licensed pilot on board or not, it is the special duty of the master to be vigilant and careful to avoid collision with other vessels.

The damage arising from collision, unless it be imputable to the mismanagement or misconduct of the master or mariners of the vessel damaged, is a loss by the perils of the sea, within a policy of insurance, and is a subject of particular average, of which I will treat in the following letter. But if, in consequence of the collision, the vessel insured has done more damage than she has received, and, under the rule in admiralty, of adding together the amount of damage done to both ships, and dividing the combined amount equally between the owners of the two,—the vessel insured has to pay a damage to the other vessel; this is not a loss to which the underwriters are liable, nor are they liable for the expense of the wages and maintenance of the crew during the time the vessel is detained in repairing the damage done to herself.⁹

If the cargo be damaged or lost by the collision, the damage sustained, or the value of the cargo, is included in the amount of the damages. And, in a case already referred to, where one of the vessels and her cargo were sunk, in consequence of a collision, in which both vessels were in fault, the whole damage sustained by the

⁸ *The Maria*, 13th November, 1839.

⁹ *Vaux v. Salvador*, 14th January, 1830; 4 A. E. 490.

former vessel and her cargo, was appointed to be borne equally by the parties.¹ An action can be maintained by the owner of the goods lost or damaged by a collision, against the owners of the vessel in fault.² In this country, the cargo of the vessel in fault cannot be made liable in contribution to the expense, because, in no sense, can the collision be in any way imputable to it; and, besides, although the owner of the goods is burdened with a share of the contribution, the owner of the vessel is bound to relieve him of any sum he may pay on this account.³

As between the ship and the cargo the following distinction is admitted:—if the collision has happened through the negligence or misconduct of the master or crew, or could have been prevented by them, the owners of the vessel are liable, on the charter-party, to the owner of the goods; but, if the collision was such as no human prudence could guard against, or if it has happened without fault, then it is a peril of the sea, within the usual exception of the charter-party. As, in an action by a merchant against the owner of a vessel, for not conveying his goods,—the vessel was run down in daylight, and not in a tempest, by one of two other vessels reaching in an opposite direction to her, both of which kept to windward, as did also the vessel run down; but it was matter of so much doubt whether the master ought to have understood the course which the others would pursue, and have borne to leeward to avoid them, that no blame was considered to be imputable to him for not doing so, and no fault was attributed to either of the other ships; and, therefore, the loss of the goods was held to have happened by a peril of the sea, and to be within the meaning of the exception.⁴

The responsibility of the owners of the vessel, for damages done by collision, is limited to the value of the ship, and of the freight due, or to grow due, as will be afterwards explained;⁵ but the statutes, limiting their responsibility, do not apply to the master or mariners.

I am, &c,

¹ *Hay v. Le Neve*, *ut sup.*

² *Abbot*, 240.

³ *Ibid.*

⁴ *Buller v. Fisher*, 1800; 1 *Esp.* 67.

⁵ *Richmond, West*, 16th June, 1838; 3 *Hag.* 431.

LETTER XV.

Particular average or partial loss—meaning of the term—as understood in ordinary use—in regard to the ship—destruction of by fire—loss from mistake, &c., of master or mariners—from perils of the sea—vessel must be sufficiently tight and strong—loss from tear and wear—from extraordinary causes—different degrees of seaworthiness—instances of—one-third of expense of repairs deducted in settling with underwriters—partial loss upon goods—rules for ascertaining value of part of goods lost—in valued or open policy—partial damage—Lord Mansfield's rule for ascertaining—in valued policy—in open policy—goods in separate packages insured for slump sum—partial loss excluded by memorandum—how far underwriters liable—instances of several partial losses can be added together—when liable for total loss of part—instances of—expenses—paid by underwriters independent of particular average—small or petty average—meaning of the term—primage and average—meaning of the terms.

GENTLEMEN,

Referring you to a former letter on general average, as to the meaning of that term, and what are the subjects of it, I now proceed to the subject of particular average, and I beg you will attend to what is the proper meaning of that term.

All the writers upon the laws of insurance and shipping concur in holding, that this term, "particular average," is very improperly applied to those particular or partial losses, which may arise from damage to the goods or ship, and which are not subjects of a general average contribution,¹ and which have, therefore, no connection with an average properly so called. This term, "particular average," is used to denote, in general, any kind of damage or expense, short of a total loss, which applies to one part of the concern only, and which must be borne by the owner of that part of the concern alone.² As applied to the ship, this particular average, or partial

1 1 Park, 216; 2 Arn, 955.

2 2 Arn. 956.

loss, implies a damage sustained by the ship in the course of the voyage, from any of the perils enumerated in the policy; and, as applied to the cargo, means the damage which the goods may have received from storms, stranding, or shipwreck, without any fault of the master, although the whole, or the greater part, may arrive in port.³ The same expression is also applied, very erroneously, to denote a total loss of part, which is quite distinct,—there being many cases in which the underwriters will be protected by the memorandum at the foot of the policy, from all claims to partial losses, and yet, a total loss of a part can be recovered, where a particular average would not; and if the loss, however inconsiderable, arises from a general average, the underwriters are liable. Another distinction is, that many cases may arise, where there can be no claim for particular average, either because the goods were warranted free from particular average, or because they are warranted free from average under a certain per cent., and the damage does not amount to that per cent., yet the expenses incurred for the preservation of the same goods can be claimed.⁴

A simple or particular average is, therefore, strictly speaking, no average at all, but is only the damage incurred by or for one part of the concern, which that part alone must bear, although the expression is sufficiently understood, and is now received into familiar and ordinary use. The loss of an anchor or cable, the starting of a plank, are matters of simple or particular average, for which the ship alone is liable. Should a cargo of wine turn sour on the voyage, it would be a matter of simple average, which the goods alone must bear; and there might be a simple average, for which each would be severally liable, under a misfortune happening both to ship and cargo, at the same time, and from a common cause; as, if a water-spout should fall on a cargo of sugars, and a plank, from the same violence, should start at the same time.⁵ These partial losses fall upon the owners of the property so damaged; and, should that damage arise from any of the perils

³ 1 Park, 218.

⁴ Ben. 424.

⁵ Lord Stowell, in the *Copenhagen*, 12th April, 1799; 1 Rob. 293.

insured against, the owners have to be indemnified by the underwriters.

Let us see, then, what are partial losses, or particular averages, in regard to the ship; and there are difficulties here, both as to the underwriters' liability, and as to the manner of ascertaining the amount of the loss. No doubt, when the amount of the loss can be sufficiently ascertained and known, there is little room for question as to the underwriters' liability; as, when by a peril within the policy, any part of the vessel or her appareling, or of her stores, are damaged or destroyed, the underwriters are liable for the partial loss. For example, where a vessel was voluntarily set on fire, or burned, to prevent her falling into the hands of the enemy, this was held to be a loss within the policy,—Lord Ellenborough observing, “if the ship is destroyed by fire,”—this being one of the perils against which the underwriters undertake to indemnify the insured,—“it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state; nor can it make any difference whether the ship is thus destroyed by third persons, officers of the king, or by the captain and crew, acting with loyalty and good faith.”⁶ In another case, the mate, being left in charge of the vessel, had lighted a fire in the cabin, and, in the evening, without leaving any person on board, he went on board another vessel, lying alongside; and at twelve o'clock at night, he looked out from the vessel he was in, and finding everything quiet on board his own ship, went to bed; but, in the morning, he was alarmed by fire, and his own vessel was soon consumed;—the underwriters were found liable, although it was admitted, that the loss arose from the negligence of the mate, in lighting a fire in the cabin, and not seeing that it was properly extinguished;—Justice Bayley remarking, “in this case the loss is occasioned by fire, against which the assured is protected by the terms of the policy; and, in our law at least, there is no authority which says, that the underwriters are not liable for a loss, the proximate cause of which is one of the

⁶ *Gordon v. Remington*, 21st December, 1807; 1 Camp. 123.

"enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners." And, upon the same principle, it has been held, that the underwriters were liable for a loss arising from a peril of the sea, although it arose remotely from the negligence of the master and mariners.⁷

But, in ascertaining partial losses, the difficulty arises in discriminating losses which may have originated in the mistake, ignorance, or inattention of the master or mariners, from those which may have arisen directly from the perils of the sea, strictly so called. For the former, the underwriter is not liable, as the owner is bound to provide a competent and skilful master and crew, although, where these have been once provided, the negligent absence of all the crew, at the time of the loss, is no breach of the implied warranty, that the vessel shall be properly manned;⁸ and, therefore, where the loss arises immediately and directly,—not remotely and consequently,—from the fault of the master and crew, the loss must fall on the owner himself. Where, however, the loss has arisen truly from the perils of the sea, in ascertaining the amount of the damage, there must be distinguished,—between that which has been actually produced by the insufficiency of the vessel, or by the wear and tear of the voyage, which must be borne by the owner himself,—and that which can be truly ascribed to a peril of the sea, for which only the underwriter is liable,—as well as between damage from recent causes, and that which has arisen from previous hidden defects in the vessel.

In a former letter, I have treated of the seaworthiness of the vessel; and you must recollect, that she must be sufficiently tight and strong, and well and properly found in everything necessary for the voyage insured. She must be sufficiently strong, and provided with all the necessary apparelling and apparatus, which will enable her to encounter and overcome the ordinary difficulties that may be expected in the course, or according to the

⁷ *Busk v. Ro. Ex. Ass. Co.*, 6th Nov. 1818; 2 B. A. 73.

⁸ *Walker v. Maitland*, 3rd November, 1831; 5 B. A. 171.

⁹ *Busk*, *ut sup.*

nature of the voyage. Where, therefore, under ordinary circumstances, cables are broken or chafed, sails and yards carried away, or sails blown to pieces, in the ordinary service of the vessel, or any other damage sustained by the vessel or her apparelling, in the ordinary course of the voyage, this must be attributed to the tear and wear necessarily attending the common course of that voyage, which the owners must bear. But, where the loss is caused by an extraordinary event;—by the violence of the wind and waves,—by a storm or hurricane,—then the loss is to be made good by a particular average, and the underwriters on the ship are liable for it; as, where a vessel in a storm is dismasted, but the broken masts still remain attached to the vessel by the rigging, and the rigging has to be cut, in order to liberate the vessel from the wreck,—this accident arising from an extraordinary cause, must undoubtedly render the underwriters liable for the loss.

But, there are different degrees of seaworthiness, according to the age of the vessel insured; and every underwriter knows, that, although an old vessel may be perfectly seaworthy for the given voyage, her strength to encounter extraordinary sea risk, may not be the same as that of a new vessel; and, therefore, he does not insure the old vessel at the same premium as the new, but the increased risk is counterbalanced by a higher premium, according to the age of the vessel. Whatever may be the age of the vessel, however, the insured does not require to disclose anything as to her seaworthiness, unless such disclosure be specially asked for by the underwriters. The general rule is, that the vessel must be seaworthy for the voyage insured, and this is expressly understood in all insurances. If the vessel, then, be seaworthy, whether she be old or new, and if she be lost from any extraordinary and unforeseen perils, arising during the voyage, the underwriters must pay for a total loss; and, in like manner, he must pay for partial damage from the same causes, whether the ship be old or new, although, in the same circumstances, a new ship may not have received damage to the extent of an old one; only, in the repairs of an old vessel, many

articles will necessarily be included, the expense of which was not owing to the effects of the last accident, and which must, therefore, in adjusting the partial average, be separated, as far as it can practically be so.

The most common instances in which particular averages occur are :—

1. Where a mast, cable, or other part of the vessel is carried away by a storm, and not parted with, cut away, or abandoned, in order to save the vessel,—this loss must fall upon the ship and freight, and, if insured, is to be indemnified by a particular average;¹ because, although the tempest was the occasion of the loss, it was not a voluntary sacrifice, and was incurred without any deliberation or intention on the part of the master and crew, with a view to save the ship and cargo; but if, in entering a port in a storm, the master cut away a cable, in order to fasten the vessel to the pier, and prevent collision with another vessel, this is to be made good by a general average contribution.²

2. When the masts, sails, and bowsprit have been damaged in a storm, or sudden squall, and, in order to repair these damages, the master puts into a port, the expense of these repairs forms a subject of particular average.³

3. Although, in the ordinary case, damage sustained in avoiding a lee shore, falls under the ordinary tear and wear of the voyage, which the vessel ought to be strong enough to undergo, yet, where the damage arises from extraordinary circumstances, as by standing out to sea with a press of sail in tempestuous weather, in order to avoid being driven on shore and stranded, or, by carrying a press of sail in order to avoid or escape from an enemy, this damage can be claimed as a particular average from the underwriter.⁴

Where the vessel has stranded, or struck the ground, or strikes upon a rock, this is also particular average, unless where there has been a voluntary stranding, for the general safety of the ship and cargo.⁵

1 2 Arn. 756. 1 Park, 283. 2 Berkley v. Presgrave; 1 East. 220.

3 Power v. Whitmore, 1815; 4 M. S. 141.

4 Covington v. Roberts; 2 N. R. 378. 5 2 Arn. 796.

5. Where, in scudding before the wind, in lying to, or in a heavy cross sea, the pitching and rolling of the vessel carries away her masts, or damages her staunchcons or upper works, or heavy seas burst the sails, or wash overboard the boats, properly fastened to ring-bolts on deck, or wash over other articles then necessarily on deck,—these are all matters of particular average.⁶

6. Where, in a storm, or from some other violent cause, the vessel springs a leak, from which damage ensues, this falls under particular average, unless the leak arises from the ordinary working and straining of the vessel, or is owing to her age or insufficiency, or some other hidden defect.⁷

7. Where damage is done to the vessel, or by her running foul of another vessel, or being run foul of by another, without blame being attached to either side, the damage thereby sustained is also defrayed by a particular average; and where the collision has been occasioned by the negligence or misconduct of the other vessel, the underwriters on the vessel injured are liable for the loss, as particular average, only, they can recover the damage from the owners of the vessel causing the injury.⁸

In settling with the underwriters for partial losses on the ship, it is the practice, where the partial loss has been repaired, to deduct one-third from the expense, both of the material and labour expended in the repair; and this will show you the necessity of preserving all the accounts and vouchers of any such expenditure, to produce to the underwriters, and establish your owner's claim.

Although you may not be so immediately connected with partial losses upon the goods as upon the ship, yet it is highly proper that you should have a distinct knowledge of the principles upon which such losses are indemnified by the underwriters, as there may be situations in which that knowledge can be of much avail to you, and may enable you to act with certainty and determination.

6 Ben. 454; 2 Arn. 757. 7 2 Arn. 757; 2 Mar. 546.

8 2 Mar. 495; Ben. 455.

Where the cargo consists of several parcels of goods, and should any part of these parcels, capable of separate and distinct valuation, be totally lost, then the underwriters must pay to the owner the value of the part so lost. There is a total loss of these goods, which, as has been already remarked, can be recovered, in cases where a particular average could not; and the rules for ascertaining the value of the part so lost are as follows:—if the goods are valued in the policy at a slump sum, it is a proportion of that value, corresponding to the proportion which the goods lost bear to the whole goods insured; as, if one hundred hogsheads of sugar are insured at a certain sum, as the value of the whole, and ten hogsheads are totally lost, the sum which the underwriter has to pay, is a sum bearing the same proportion to the value insured, that ten bears to one hundred;—if the goods are not valued in the policy, the invoice price of the goods, and all charges, the commission, and the premiums of insurance, form the value upon which the loss must, in the same way, be calculated.^o The price which the goods saved may bring at the port of destination,—the rise and fall in the market,—or the course of exchange, cannot enter into the calculation of the value.¹

It is in the case of partial damage, however, by which the goods insured are rendered of less value, that a difficulty arises in ascertaining the proportion or extent of the damage. The leading principle is, that, where the goods are lessened in value by damage received from the perils of the sea, the underwriter must put the merchant in the same situation as he would have been had they arrived sound and free from damage, or, as if the loss or damage had not occurred. Where the goods are valued in the policy, the mode of ascertaining the extent of the damage, and the sum which the underwriter has to pay, has been thus forcibly illustrated by Lord Mansfield:—he takes the proportion of the difference “between sound and damaged at the port of delivery, “and pays that proportion upon the value of the goods “specified in the policy, and has no regard to the price

^o 1 Park, 222-3. 1 Ibid, 225.

"in money, which either the sound or the damaged goods bore in the port of delivery. He says, the portion of the difference is equally the same, whether the goods come to a rising or a falling market. For instance,—suppose the value in the policy to be £30, the goods are damaged, but sell for £40; if they had been sound, they would have sold for £50. The difference, then, between the sound and the damaged is a fifth; consequently the insurer must pay a fifth of the prime cost or value in the policy,—that is, £6. On the other hand, if they come to a losing market, and sell for £10, being damaged, but would have sold for £20, if sound, the difference is one half, the insurer must pay half the prime cost, or value in the policy, that is, £15."²

It has been held, that the same rule is to be applied in an open policy, and that the rule for estimating any loss of goods insured by such a policy is,—to take the invoice price at the port of lading, together with the premium of insurance, and commission, as the basis of the calculation, for the value of the goods. And the rule for estimating a partial loss, in the like case, is the same as upon a valued policy,—by taking the proportionate difference between the selling price of the sound, and that of the damaged goods, at the port of delivery, and applying that proportion, with reference to such estimated value at the loading port, to the damaged portion of the goods.³

If the goods are in separate packages, and insured for a slump sum, and, on the wreck of the vessel, some are totally lost, and the rest are saved, though damaged, the insured are entitled to recover as for a total loss, in regard to the former,—but, as to the latter, it is only a partial loss, from which, if the goods are one of the enumerated articles, the underwriters are protected by the memorandum,—of which immediately.⁴

It has been already noticed, that, by the memorandum at the foot of the policy, the underwriters are not liable for any partial loss happening to certain enumerated

² *Lewis v. Rucker*; 2 Burr. 1167. ³ *Usher v. Noble*; 12 East. 639.

⁴ *Davy v. Milford*; 15 East. 559.

articles of a perishable nature, which are liable to be damaged by their own inherent and natural corruption, and they are protected from partial losses on certain other articles, under five per cent., unless the average be general, or the ship be stranded. The meaning of the terms,—“unless the average be general, or the ship be stranded,” was also explained; and that, when the vessel has been stranded, within the meaning of the policy, this destroys the effect of this exception, and the policy operates in its full force, so as to render the underwriters liable, if the vessel has been once stranded, for all subsequent losses, whether that loss was a consequence of the stranding or not. It only now remains to be seen, how far the underwriters are protected by the memorandum, from losses not arising from a general average, nor from a stranding.

Thus, where a vessel, with a cargo of corn, had met with a storm, and was obliged to run into the nearest port to refit, where a considerable expense of repairs was incurred; and, on arrival at her port of destination, the corn was found to be greatly damaged, to the extent of £56 19s. 8d. per cent.;—it was held, that this loss not having arisen from a general average, nor from the vessel's being stranded, could not be recovered from the underwriters.⁵ In another case, a vessel with a cargo of fruit from Lisbon to London, was captured and recaptured in the course of the voyage,—brought into Portsmouth, and afterwards arrived in London; but, by the capture and recapture, and consequent length of the voyage, the cargo had sustained a damage of £80 per cent.;—this was held to be a partial loss, for which the underwriter was not liable.⁶ And, in another case, a cargo of peas arrived at the port of destination, so much damaged as to be sold for three-fourths less than the freight; but it was held, that, as the goods mentioned in the memorandum had arrived at the market, the underwriters were not liable.⁷ So also, rice from Charleston to Liverpool, was insured, warranted free from particular average; the vessel with the rice arrived within the

⁵ *Wilson v. Smith*; 3 Burr. 1550. ⁶ *McAndrew v. Vaughan*, 1 Mar. 223.

⁷ *Mason v. Skurry*; 1 Mar. 218.



limits of the port of Liverpool; but, before she could be brought to her moorings, or be at all unloaded, she ran aground and was wrecked, and the whole cargo was taken out in craft, carried to the consignee at Liverpool, and sold, and produced, upon the *whole*, little more than would pay freight and salvage; but the rice did not produce sufficient to pay the freight;—it was held, that this was a particular average only, and, therefore, as to the rice, the underwriters were exempted by the warranty.⁸

But, should any of the articles upon which the underwriters are not liable for a partial loss, under 3 or 5 per cent. sustain several partial losses, each individually less than 3 or 5 per cent., the whole of these partial losses can be added together, so as to make up the 3 or 5 per cent., or more, for which the underwriters are liable.⁹

Although the underwriters are exempted by the memorandum from particular average, on certain articles, yet they may be liable for a total loss of part of the goods insured, if they are packed in distinct packages, and are of a description to admit of being divided. As, in the case already referred to, flax was insured, packed in mats, in twenty-four separate packages, and warranted free of particular average; the vessel was wrecked, and no entire package was saved, but part of the flax floated ashore, or was got out of the wreck, wet and loose, to about one-sixth of the whole,—the nett proceeds of which amounted only to 2½ per cent. on the sum insured;—it was held, that the insured could recover for a total loss of that part which was, in fact, totally lost, but not for the remainder, which existed in specie, though deteriorated.¹ And, in a subsequent case, sugar, in hogsheads, was insured, warranted free of particular average;—the vessel grounded and bilged, and all the hogsheads were got on shore, with some sugar in each, but in general, not much, and nearly all damaged;—it was held, that, if any hogsheads had been lost, it would have been a total loss as to them, as in the preceding case; yet, as each hogshead had some sugar in it, this

⁸ *Glennie v. Lond. Ass. Co.* 8th February, 1814; 2 S. 371.
⁹ *Blackett v. Ro. Ex. Ass. Co.*; 2 Cr. J. 244. ¹ *Davy, ut sup.*

was only a partial loss, for which the underwriters were not liable.² But, if the cargo,—as wheat,—is shipped and insured in bulk, warranted free from average, unless general, or the ship be stranded; and in tempestuous weather, during the voyage, a part of the wheat is pumped out, and lost,—there cannot be a total loss of a portion only of the cargo, and the insured cannot recover, as for a total loss of the part lost.³

This term, “particular average,” is not understood to comprehend the expenses laid out for saving or preserving the cargo,—as warehouse rent, which is held to be a particular charge on the cargo,—and the expense of reloading, which is a particular charge upon the freight,⁴ and are always paid by the underwriters, independent of the particular average; and, consequently, these charges cannot be added to the particular averages, so as to increase the amount to the 3 or 5 per cent., for which the underwriter is liable.⁵

Besides this particular average, there is another kind, called small or petty average—such as the expense of pilotage in conducting the vessel from one place to another,—towage,—lights,—anchorage,—beaconage, and such other incidental charges,—which are generally borne, one-third by the ship, and two-thirds by the cargo; but these charges, if usual and customary in the course of the voyage, are never charged against the insurers, unless they have been incurred for some extraordinary purpose, or in order to relieve the ship and cargo from some immediate or threatened danger, when they are generally considered or included as general average, so as to charge the underwriters. The charges which fall under the head of small or petty average, are generally determined by the usage and custom of the particular trade or voyage.⁶

It is a common condition, in bills of lading—“paying freight for the goods, at the agreed-on rate, with “primage and average accustomed.” As here used, these words signify a small payment or gratuity made

² Hedburgh v. Pearson; 7 Taunt. 154.

³ Hills v. Mend. Ass. Co., M. T. 1839; 5 M. W. 569. ⁴ 2 Arn. 962.

⁵ Ben. 472. ⁶ 1 Park, 217; 2 Arn. 489.



by the merchant to the master, over and above the freight, for his personal care, trouble, and attention to the goods entrusted to him. This gratuity is commonly termed the master's hat-money, and is regulated according to the custom of different trades and voyages; and the master may maintain an action for it in his own name, independent of the claim for freight; unless, by the agreement between the owner and him, or by the agreement under which the goods have been shipped, this payment has been excluded.⁷

In the next letter, I will notice another incident, which may occur before the termination of the voyage, and the delivery of the goods to the person for whom they are intended.

I am, &c.

⁷ Abbot, 404.

LETTER XVI.

Stoppage *in transitu*—party must be bankrupt or have failed—or there must be strong grounds for suspecting his credit—right not taken away by part price being paid, or bills granted—master, common carrier—goods in his hands may be stopped—although vessel has been chartered by buyer—or goods are delivered free on board—unless vessel hired for a period of years—goods placed in the hands of warehouseman or wharfinger—whether as an intermediate stage of passage—or as the final destination—instances of—where goods so placed, evidence of intention must be preserved—instances of—goods sold free on board—instances of—though vessel chartered wholly by buyer—master still common carrier—goods delivered by master after notice—instances of—delivery of part of entire cargo, delivery of whole—instances of—when something remains to be done—instances of—delivery of part, as a part—instances of—goods detained by carrier for freight—party entitled to stop—consignee of goods on joint account—alien enemy—mutual dealings—no change in buyer's circumstances—no stoppage between principal and factor—nor by a mere security—nor by one holding a lien—right not defeated by bills being granted—nor part of price paid—nor by carrier's detention—nor by attachment—manner of stopping—should be in writing—presenting bills of lading and demanding goods—entering at custom-house—must be given to master—not to shipowner—nor to bankrupt—goods delivered by mistake—stoppage under judicial authority—whether stoppage puts an end to contract, or entitles seller to resume possession—instances of—possession of bill of lading by third party—bill with conditions—unconditional bill—honest transfer of—fraudulent transfer—rule as to both instances—mark placed upon goods—anticipated possession—factor pledging bill—rights of owner—instances of—general summary.

GENTLEMEN,

I have said in a previous letter, that your paramount duty was to deliver the goods shipped, at the port of destination, to the party entitled to them; but, although they may have arrived safe at their port of destination, you may be prevented from delivering them in terms of the bills of lading or charter-party, by notice from the party in right of the goods, not so to deliver

them. This is called stoppage *in transitu*, or stoppage during the voyage or passage; and, in treating of it, I will consider in what cases goods may be so stopped, and under what circumstances they are held to be still in the course of passage,—who is entitled so to stop them,—how this right is to be exercised,—and what prevents this right from being exercised.

You will understand, that this right of stoppage can only be exercised by the party sending the goods, for securing the price of these goods, where the person, to whom they were to be delivered, has actually failed, or stopped payment, or is bankrupt, or where there are strong grounds for suspecting his credit, or that he will immediately fail or become bankrupt. This right is not taken away by bills having been granted for the price of the goods, but which bills turn out bad;¹ nor by a bill having been accepted for the price of the whole, or for part of the price, and it being endorsed to a third party;² nor although a part of the price has been paid by the person to whom the goods were to be delivered.³

You should never lose sight of this principle,—that you are a common carrier; and, therefore, while goods are in your possession, as such, the party in right of these goods, is entitled to prevent the intended delivery of them. This may be considered the simplest case of a stoppage of goods during the passage; and, therefore, while the goods are in that state, you are considered as a middleman between the parties, and as entrusted with the custody of the goods, for the protection, on the one hand, of the seller's claims of detention over the goods, until he be satisfied for the price, and on the other hand, of the purchaser's right of property in them: and neither will this character of middleman be altered, nor the seller's right to stop be prevented, although the buyer charter a vessel, and send her out for the goods,⁴ or although the goods have been sold free on board the vessel.⁵ But, where a vessel had been chartered for

¹ *Owenson v. Morse*; 7 T. R. 64.

² *Feize v. Wray*, 1802; 3 East. 93. *Edwards v. Brower*, E. T. 1837;

³ *M. W.* 375. ³ *Hodgson v. Loy*; 7 T. A. 440.

⁴ *Clay v. Harrison*, 21st Nov., 1829; 10 B. C. 99.

⁵ *Ruck v. Hatfield*; 5 B. A. 632.

three years, and a receipt for the goods had been given in the name of the charterers, it was held, that this was such a delivery to them as defeated the seller's right to stop.⁶

While the goods remain in your possession, and under your control, there can be no doubt that they are still in the course of the passage, and can be stopped by the unpaid shipper; and, therefore, in such a case, there is little room for any dispute; but, where the goods have been placed by you in the hands of a third party,—as a warehouseman or wharfinger,—questions of difficulty may arise,—whether, when the goods were so placed, this was done merely as an intermediate stage in the course of the voyage, and with a view to their farther conveyance; or whether, when so placed, they had so far arrived at their destination, as to await the orders of the buyer for their further progress. In the former, the goods are still held to be in the course of passage, and can be stopped; but, in the latter, the goods are held to have arrived at their destination, and to be in the possession, either actual or constructive, of the buyer or his agent. A few instances will make this plain.

A merchant in this country sold goods to a firm in Paris, and, by the direction of their agent here, the goods were sent to the house of a packer in London, on 3rd September; the agent, having a general power to send the goods to Paris, to Holland, or to Germany, unpacked some of the goods in the house of the packer, and sent some of them off, and the remainder were repacked; the bankruptcy of the company in Paris was announced on the 7th September, and the seller tendering the charges, demanded his goods; but it was held, that the goods having been received by the packer for the agent of the company, and he holding a general authority to send them to such market as he thought fit, these goods were delivered, and, therefore, that the delivery was completed, so as to deprive the seller of his right to stop *in transitu*.⁷ In another case, traders in London were in the practice, for several years, of

⁶ Fowler v. M'Taggart; 7 T. R. 442.

⁷ Leeds v. Wright, 1803; 2 B. P. 320.

sending orders to Baldwin for goods, to be forwarded to a company at Hull, to be shipped for Hamburg; and, when the goods arrived at Hull, the trader sent orders to the company there, where and to whom to send the goods at Hamburg; eighteen bales of cotton twist were, by the directions of the traders, sent in packages, with a certain mark, "per order, and to be forwarded to the company at Hull, to be shipped for Hamburg, "as usual;"—the traders failed in July, and Baldwin went to Hull, and demanded the goods; the traders called a meeting of their creditors, and it was resolved to give up the goods, which was communicated to Baldwin on 29th July; no act of bankruptcy took place until September, when the assignees claimed the goods; and, when Baldwin stopped the goods, in July, four bales were actually shipped for Hamburg, but were returned to the company's warehouse at Hull, and the whole were given up to Baldwin, on an indemnity;—it was held, that the goods had so far gotten to the end of their journey, that they waited for new orders from the purchasers to put them again in motion—to communicate to them another substantive destination, and, without such order, they would have remained stationary; and, therefore, that the warehouse of the company at Hull must be considered as the warehouse of the traders, the purchasers, so as to cut off the seller's right to stop them.⁸ Again,—Lange, of London, had been in the habit of exporting goods to the continent, and ordered six bales of twist for that purpose, which were delivered to the carriers, with an address to Lange, in London; he had no warehouse of his own in London, but goods sent to him remained at the waggon-office of the carriers, until removed by his shipping agents; the bales in question arrived at the carrier's waggon-office, and notice was sent to Lange's clerk, of their arrival, who saw the bales, and said he would give orders to the shipping agent to go for them as usual; but, next day, he told the warehouseman not to let them go without orders; the day after, the agent of the consignor or seller gave notice to deliver the goods to Lubman and

⁸ *Dixon v. Baldwin*, 1804; 5 East. 175.

Co., which was done accordingly, and, a few days before, Lange had committed an act of bankruptcy; and, in an action by his assignees, it was held, that if a man be in the habit of using the warehouse of a wharfinger as his own, and make it the repository of his goods, and dispose of them there, the journey is at an end when the goods arrive at such warehouse; and, therefore, as the bankrupt was in the habit of leaving goods at the waggon-office, until he gave orders for their shipment or removal, their arrival at the waggon-office put an end to their journey, as between buyer and seller, and deprived the latter of his right to stop them.⁹ And, in another case, five hundred pieces of printed calico were bought by individuals for a foreign house, to be sent to Lisbon; these individuals were packers and warehousemen, as well as the general agents for the buyers; and, the buyers having failed, the goods were stopped in their warehouse;—it was held, that as packers or warehousemen, the goods delivered to them, to be sent to Lisbon, were still in the course of passage, and might be stopped, and that the character of agents made no difference,—that it was a general rule, that where goods are sold, to be sent to a particular destination, named by the purchaser, the right of the seller to stop them continues until they arrive at their destination,—and that, here, the place named by the buyer, was Lisbon, and not the party's warehouse.¹

Where, therefore, the goods are placed in the hands of a third party, as wharfinger or warehouseman, evidence of the intention with which they are so placed or received, must be preserved and given; as, in the case where goods arrived at a wharf, at which the master was in the habit of trading; the buyer was from home, but his clerk told the master, he had better land the goods on the buyer's account; the goods were accordingly landed at the wharf, and entered in the wharfinger's books with "freight and charges" entered opposite, and not in the name of any party;—the buyer having become insolvent, they were stopped by the seller;—

⁹ *Rowe v. Pickford*, 1817; 8 Taunt. 83.

¹ *Coates v. Railton*, 2nd May, 1827; 6 B. C. 422.

and it was held, that the *transitus* was not determined.² And, where the goods were landed at the warehouse of a wharfinger, which the buyer used as his own, for the purpose of stowing such goods, and keeping them until carried away to his customers, in his own carts; but, though they were landed by the buyer's permission, he did not intend to take possession of them as owner, although his intention had not been communicated to the wharfinger;—it was held, that the goods were still in a state of passage, while in the hands of the wharfinger, and could, therefore, be effectually stopped by the seller.³

Where goods are sold, to be delivered free on board a vessel, named by the buyer, the seller can preserve his right to stop the goods while in the course of the passage,—the buyer having failed, and the price being unpaid,—by taking a receipt for them, from the master or other person in charge, in his own name;—as, where goods were bargained for, to be delivered free on board a certain ship, and the seller sent them to the ship with a written order addressed to the commanding officer on board,—“receive the undermentioned goods for and “on account of” the sellers; a receipt was granted bearing to have “received on board, &c., the undermentioned “sugars for Hamburgh, for, and on account of” the sellers; the purchasers failed, and the lighterman demanded the goods, on the part of the sellers, producing the receipt, and tendering the freight and charges. The buyers, in the meantime, had sold the goods to a third person, and to him the shipmaster had inadvertently granted a bill of lading in his own name, without having received the receipt;—but, in an action by the sellers against the shipmaster, for delivery of the goods, they were found entitled to them,—the jury considering, that the receipt kept full control over the goods, till it was given up, and that nothing had deprived the sellers of their right to stop the goods *in transitu*.⁴ And, although the master refuse to sign a receipt for the goods, as shipped in the name of the seller, and he afterwards

² Edwards v. Brewer, E. T. 1837; 2 M. W. 375.

³ James v. Griffin, 3 T. 1837; 2 M. W. 623.

⁴ Craven v. Ryder, 1816; 6 Taunt. 433.

sign and deliver a bill of lading to the buyer, who becomes insolvent before the vessel sails,—the seller still retains his right to stop the goods, and he has an action against the master for redelivery of them to him ;—as, where rum was sold free on board, and was shipped on board a vessel, and a receipt, acknowledging the goods to be shipped by the seller, was tendered to the mate, who refused to sign it; thereafter, the master signed bills of lading, deliverable to merchants in Hamburg, correspondents of the buyers, who, in a few days afterwards, stopped payment; the seller then sent to the master, requiring a formal receipt, that he had received the rum on the seller's account, which was refused ;—and in an action against the master for delivery of the rum to the seller, he was held entitled to it, on the ground that the *transitus* was not at an end by this delivery on board, and that it was the master's duty to sign the receipt, and not the bills of lading, till the receipt had been delivered by the sellers to the buyers.⁵

In general, the master of the vessel, even though it be chartered wholly by the buyer or consignee, is held to be in the same situation as a common carrier; and, therefore, his possession of the goods is only the possession of a carrier,—the contract being with him for the carriage of the goods; and until their arrival and delivery, the goods are on their passage and transit from the seller to the buyer, or from the consignor to the consignees.

If, after timely notice by the seller, to stop the goods, the carrier, by mistake, delivers them to the buyer, the seller has still his action, after such notice, against the person to whom they have been so improperly delivered, for their redelivery, although, on his bankruptcy, the goods may have passed into the hands of his assignees or trustees ;—as, where a seller delivered goods to a carrier, to be carried to the buyer, but he, seeing good cause, immediately afterwards, to prevent delivery, stopped the goods, while on the journey ;—the carrier, however, by a mistake of his clerk, delivered the goods to the buyer, who unpacked them and sold part; and, some

⁵ *Ruck v. Hatfield*, 30th April, 1822; 5 B. A. 632.

weeks afterwards, he became bankrupt, and the unsold goods were taken possession of by the assignees; but, in an action against these assignees, the seller was found entitled to recover the goods.⁶

It is the rule in England, contrary to what was once held in Scotland, that delivery of part of an entire cargo to the buyer or consignee, is a delivery of the whole, so as to prevent the seller or consignor from exercising his right to stop it, as still in the course of passage;⁷—as where a cargo of wheat was shipped on bills of lading, delivered to the buyers, and by them sold to a third party, whose agents, on the arrival of the vessel, entered the goods in their own name at the custom-house, and took delivery of eight hundred bushels on his account; but the original buyers having become bankrupt, the original seller gave notice to the shipmaster to stop the delivery;—it was held, however, that the *transitus* was ended by the delivery of the eight hundred bushels, which must be taken to be a delivery of the whole,—there appearing no intention, either previous, or at the time of delivery, to separate part of the cargo from the rest.⁸ And where a number of bales of bacon, lying at a wharf, were sold for an entire sum, and a delivery order given to the wharfinger, and the buyer weighed over the whole,—took away twenty-five bales,—and left the remainder with the wharfinger; he then failed, and the seller ordered the wharfinger not to deliver;—but it was held, that, as the buyer had weighed over the whole, this was taking possession of the whole, and the seller had no right to stop what remained with the wharfinger.⁹

But where any thing remains to be done between the buyer and the seller,—as counting, weighing, or measuring,—before complete delivery can be made, or where a part is separated from the whole, and delivered as a part, and is not intended as a delivery of the whole, the seller is not deprived of his right to stop;—as was held in the following instances:—

An individual sold all his starch, lying in a certain

6 *Bothlingk v. Inglis*, 1803; 3 East. 381. 7 *Abbot*, 525.

8 *Sluby v. Hayward*, 1795; 2 H. Black. 504.

9 *Hammond v. Anderson*; 1 B. P. 71.

warehouse, at a certain sum per cent., to be afterwards weighed, in order to ascertain the amount of the price at that rate; the seller gave the buyer a note to the warehouse keeper, to weigh and deliver five hundred and forty papers of starch, which was done, and the starch to that extent removed; a considerable quantity remained in the warehouse unweighed, when the buyer failed;—and it was held, that the seller was entitled to this quantity, on the ground that the weighing, which was indispensably necessary to precede the delivery of the goods, and to ascertain the price to be paid for them, had not been performed at the time when the action was brought.¹ So also, where fifty tuns of Greenland oil, lying at a wharfinger's, were sold at so much per tun, to be paid by an acceptance at four months; and an order was given by the sellers to the buyers, addressed to the wharfinger, to deliver to the latter the fifty tuns out of their ninety tuns of Greenland oil; but nothing had been done on this order, when the buyers failed, and the order was countermanded. Before Greenland oil is delivered, the practice is, to have the casks searched by the seller's cooper,—the broker for both parties taking a note of the foot-dirt and water in each cask, and the casks are then filled up by the seller, and delivered in a complete state; but, in this case, nothing of all these had been done;—it was held, that these were material acts to be done by the seller before delivery, and that, therefore, before the oil was measured out, and these things done, the order for delivery had been effectually countermanded.² And, in another case, a quantity of rosin, in the warehouse of the seller, was sold, and the price paid by the buyers,—it being to remain in the seller's warehouse; and, while in that state, the buyers sold it to a third party, to whom they gave a delivery order on the original sellers, which was lodged with them, and they were ready to weigh and deliver; but the second purchaser never attended;—he stopped payment, and the original buyers countermanded the delivery order;—it was held, that this countermand

¹ *Hanson v. Meyer*, 1805; 6 East. 614.

² *Wallace v. Broada*, 1811; 13 East. 522.

was in time, because, until everything was finished in weighing, &c., the delivery was not complete, although, if the rosin had been weighed, a delivery order, with notice, though without entry in the holder's books, would have completed the transfer.³

In the same manner, if a part of the whole is separated and delivered to the buyers, as a part merely, and not as the commencement of a delivery of the whole, this does not deprive the seller of his right to retain, or to stop the remainder. As, where hay was sold, and a bill granted for the price;—the buyer asked leave to cut and carry away part of the hay, which he was allowed to do, but afterwards he was forbidden to take away the rest. The bill was dishonoured, and the person who sold the hay, and to whom the bill had been granted, failed, and the owner refused to deliver the hay to the purchaser; and it was held, that the part delivery not being in execution of an intention to deliver, or to take the whole, but being specifically under an allowance to take a part, did not divest the owner of his lien or right to retain the remainder.⁴ And, where a quantity of rum was sold, bonded in the seller's name in his own vaults, and the purchase was completed, the price being paid; the buyer sold forty-six puncheons to a second, who accepted bills for the price, but received no delivery order, except for two puncheons; the second buyer sold twenty-six puncheons of his purchase to a third, who granted his acceptance for them; and his cooper, by leave of the original seller, coopered, and gauged, and marked them with the initials of the third buyer; the second buyer sold the other eighteen puncheons to two individuals, who settled by cash, brandy, and a bill, and three of the puncheons were delivered on separate delivery orders;—the second buyer having dishonoured his bills to the first buyer, the latter gave notice to the original seller not to deliver the rum; and, it was held, that, as there was no delivery order to the second buyer, the possession was not passed to him, and that the delivery of the two puncheons did not complete the delivery; that the third

³ *Withers v. Lyp.*, 1815; 4 Camp 237.

⁴ *Bunny v. Pointz.*, 1833; 4 B. Ad. 568.

purchaser had not, from the second, the evidence of a complete transfer, so as to make their case better than his; that the cooping, gauging, and marking of initials were not sufficient to complete the transfer; and that delivery of a part is no delivery of the whole, unless where it is intended as a delivery of the whole—not where it is intended to separate that part from the whole.⁵

The distinction between the two kinds of delivery is well illustrated in the following case;—where goods were forwarded in bales, by ship to London, deliverable to B. & Co., or their assigns, who were factors, for sale, and were landed at a wharfinger's wharf, to whom B. & Co. gave orders to "weigh and deliver" the goods to M., who had contracted with B. & Co. for the purchase of them; and they were accordingly weighed, and an account of weights sent to B. & Co., *who made out invoices to M.*, and he resold several bales of the goods, which were delivered by the wharfinger, upon his order, to the purchasers; the rest remained on the wharfinger's wharf until they were stopped by B. & Co., as the unpaid vendors; *they were never transferred in the wharfinger's books from the names of B. & Co. to that of M., nor was any warehouse rent paid by him*;—and it was held, that B. & Co.'s right of stoppage was not determined by the part delivery to M.'s orders.⁶

But, where a water carrier landed part of the goods at the wharf of the consignee, who was then insolvent, and had absconded, but reshipped it, and took the whole to his own premises, in order to secure the freight and carriage,—this was held not a complete delivery of part of an entire cargo, so as to end the passage as to the whole, the goods being only in the course of delivery, and possession having been neither taken of the goods, nor these weighed, so as to ascertain the carrier's freight,—and until that was ascertained and paid, or tendered, he had a special property over all the cargo for his security; and to divest the right to stop, there must be such a delivery as to divest the carrier's lien.⁷

⁵ *Dixon v. Yates*, 1833; 5 B. Ad. 313.

⁶ *Tanner v. Scovell*, 18th April, 1845; 14 M. W. 28.

⁷ *Crawsley v. Eades*, 28th January, 1823; 1 B. C. 181.

Let us next see, who is the party entitled to exercise this right of stopping goods, or preventing the delivery of them; and I need hardly mention, that the simplest case in which this can take place is, where an unpaid seller or consignor has sent goods to a buyer or consignee on credit, and the latter fails before the arrival and delivery of the goods. But this right is extended to every person who, in an equitable view, can be considered as a seller or consignor;—as, where a person abroad, in consequence of orders sent by a merchant in this country, purchased goods on his own credit from others, whose names were unknown to the merchant, and he charged the merchant a commission,—shipping the goods on account and risk of the merchant, and drawing bills on him for the price and commission;—the merchant failed before the arrival of the ship, and delivered up the bills of lading to an agent for the person abroad, upon which the goods also were delivered to the agent. In a question with the assignees of the merchant, for the recovery of the goods, it was held, that the person abroad was in reality the seller,—he being truly the buyer of the goods, and selling them to the merchant; and that, therefore, he was entitled to stop them.⁸ So also the consignor of goods for sale, on joint account of himself and the consignees, is entitled to stop them, on failure of the latter.⁹ And an alien enemy, shipping goods to a British merchant under a British license, has been allowed, by his agent, to stop the goods on their arrival in England,—the license being held to give legality to all the consequences of the sale.¹

But, where a consignor indorses and transmits the bills of lading, and sends the goods to his correspondent, with whom he has mutual dealings, in pursuance of an agreement, and in trust to pay certain acceptances, given on the faith of the consignment,—he cannot countermand delivery, and take back the goods, while the trust and consignment were unsatisfied,—nor can the master redeliver the goods to him.² Where, also, goods were

⁸ *Feise v. Wray*, 1802; 3 East. 93.

⁹ *Newson v. Thornton*, 1806; 6 East. 17.

¹ *Fenton v. Pearson*; 15 East. 419. ² *Halle v. Smith*; 1 B. P. 563.

sent on account, and at the risk of the buyer, with an invoice and bill of lading, and bills were drawn, at the date agreed on, for the price, which were sent for acceptance,—it was held, that the seller could not stop them and insist upon immediate payment,—the buyer being willing to accept the bills, and there being no alteration in his circumstances.³

There is also no place for the exercise of this right of stoppage between a principal and factor, upon the ground that the principal is never divested of the property in the goods; and, therefore, it has been held, that where the transaction between the parties, with respect to the consignments, was as between principal and factor, and not as between seller and buyer, the factor could have no property in the cargo, and the right of stoppage *in transitu* was out of the question,—that never occurring but between buyer and seller.⁴

But a person who is a mere security for the payment of the price by the buyer,—by accepting bills drawn for the price by the seller,—is not in the situation of the seller or consignor, although the bills have been sent through his hands to the buyer.⁵ And a person who has merely a lien on the goods, or a right of retaining them, without any right of property in them, cannot stop the goods, on the purchaser becoming bankrupt before their arrival; and, therefore, a fuller who had fulled cloth and forwarded it to his employer,—although, by the usage of the trade, he had a lien over the cloth for his general balance,—could not countermand the delivery, as being still on the passage, he, by parting with the possession, having lost his lien, and could not stop them as between seller and purchaser.⁶

I have mentioned in the commencement of this letter, that the right of stoppage is not taken away by a bill having been accepted for the whole or part of the price, which turns out bad,—or although it be indorsed to a third party,—nor although part of the price has been paid; neither will it be defeated by a land-carrier claim-

³ Walley v. Montgomery, 1803; 3 East. 585.

⁴ Kinloch v. Craig, 14th May 1790; 3 T. R. 788.

⁵ Siffken v. Wray; 6 East. 371. ⁶ Sweet v. Pym, 1800; 1 East. 4.

ing retention of the goods, as a security for a general balance due to him by the party to whom they should have been delivered; and the person stopping is entitled to the goods upon paying the carriage due for them only.⁷ Neither can it be defeated by any process of attachment used against them by a creditor of the purchaser, the seller's power of stopping the goods being the older and preferable lien;⁸ nor by any claim or pretence of a lien by the purchaser's agent.⁹

As to the manner in which goods may be stopped, while in course of passage, the law does not point out any special form for doing so, nor does it require any special solemnity for that purpose. It may be mentioned, however, that the mere insolvency or bankruptcy of the buyers or consignees is not itself equivalent to a stoppage, as his shop or warehouse may, notwithstanding, continue open, and his trustee or assignees in bankruptcy may receive the goods;¹ although, in Scotland, goods delivered in these circumstances, after the avowed insolvency or bankruptcy of the buyer, may be recovered by the seller, on the head of fraud.² But, in general, notice to the master or carrier, either verbally or in writing, not to deliver the goods to the buyer or consignee, is sufficient; and, when that notice is given, it is the duty of the master to attend to it. It is proper, however, in order to fix the precise date of the stoppage, that a regular notice to do so should be given to the master in writing—as by letter, for instance; or the seller or his agent may present to the master, one of the bills of lading, and demand delivery of the goods, which will complete the stoppage; or the seller can enter the goods at the custom-house, for the purpose of paying the duties on them, which is an effectual stoppage; although, afterwards, at landing, the bankrupt or his assigness, forcibly obtain possession of them.³

But, in order that this notice be effectual, it is neces-

7 *Oppenheim v. Russell*, 1802; 3 B. P. 42.

8 *Smith v. Goss*, 1808; 1 Camp. 282.

9 *Nicholl v. Le Fevre*, 1835; 2 Bing. N. C. 83.

1 *Scott v. Petit*, 1803; 3 B. P. 469.

2 *Schuerrman and Sons v. Goldie*, 7th July, 1828; 6 S. D. 1110.

3 *Abbot*, 528.

sary that it be given to the master himself, or to the person who has the immediate charge and custody of the goods; and, therefore, it has been held, that a notice to stop given to a shipowner in Montrose, while a cargo was on the voyage, which was to be delivered at Fleetwood, in Lancashire, was not sufficient,—although the owner sent a letter to await the master's arrival in Fleetwood, directing him to deliver the cargo to the agents of the seller;⁴ and intimation given to the bankrupt himself, or to his creditors, that the seller intended to stop delivery of the goods, or was in the course of obtaining a judicial warrant for that purpose, will not be sufficient.⁵

If, after this notice to stop has been properly and effectually given, the master should deliver the goods to the buyer or his creditors, or should they be delivered through mistake, he will be liable to an action for delivery of the goods to the seller, or, at all events, he will be liable to him for the loss he may sustain in consequence of the improper delivery.⁷

When this stoppage is made, not by the seller himself, nor by a person holding a bill of lading, or other express legal authority from him, but only by his ordinary and usual agent, interposing for the seller's benefit, the stoppage should be made under judicial authority, which, when required for the protection of the foreign merchant, will generally be granted, under proper precautions.

It has not yet been determined, whether the act of stopping *in transitu* has the effect of putting an end altogether to the contract for the sale or consignment of the goods, or merely entitles the seller or consignor to resume possession of the goods for his own security;⁶ but, at all events, he can pursue for the price, if, on payment being tendered, he is ready to deliver the goods.⁸ The buyer, or those in his place, may still obtain possession of the goods, upon paying or tendering the price, if already payable; or, if the price is not yet payable, on granting good bills for it, at the stipulated

⁴ *Whitehead v. Anderson*, 31st January, 1842; 9 M. W. 518.

⁵ *Robertson and Aitken v. More*, 3rd July, 1801; F. C. ⁶ *Litt, ut sup.*

⁷ *Clay, ut sup.* ⁸ *Kymer v. Sowercrop*; 1 Camp. 109.

credit, or on finding security for payment of the price when it falls due;—should none of these be done, it has been held, that the seller may resell the goods.⁹

Having thus seen under what circumstances goods can be stopped during their passage,—who are the parties entitled to stop them,—and what are the effects of this stoppage,—let us now see what will prevent the seller or consignor from exercising this right.

I need not again go over the instances, in which the goods have been held to be actually delivered to the buyer or consignee, and in which this right of stoppage could not, as a matter of course, be exercised. You will readily bear in mind, that where there has been a delivery of the goods, either actual, or what amounts in law to an actual delivery, there can be no stoppage; and, therefore, under this head, I will only consider when possession of the bill of lading by a third party, puts an end to this right.

You will see from the bills of lading, that you are bound to deliver the goods, either to a person named or his assigns, or to order or assigns; and although the person to whom the goods are to be delivered, may be in possession of a bill of lading, expressed in these or similar terms, this does not prevent the seller or consignor stopping the goods, as against that person or his creditors,—the price not being paid. But as bills of lading are negotiable documents, and can be indorsed, or transferred to other parties, it is often a very nice question,—how far the possession of an indorsed bill of lading entitles the holder of it to demand possession of the goods, and deprives the seller or consignor of his right of stoppage. Where the bill of lading contains any particular conditions or restrictions, or such are mentioned in the indorsement, the party taking the bills of lading can be in no better situation than the original party, unless he has evidence that the condition has been satisfied, or the restrictions removed. But, in the common case, an unconditional bill of lading is negotiable, the same as a bill of exchange or promissory note; and,

⁹ Abbot, 317.

therefore, when the goods are in the course of their voyage, the person to whom the bills of lading have been sent, can dispose of them, the same as if the goods had arrived; and the property of the goods is transferred, by the indorsement and delivery of the bills of lading to the person who has given a valuable consideration for such indorsement, so as to deprive the original owner of his right of stoppage. In the case, then, of a fair and honest sale or purchase of the bills of lading, and indorsement and delivery of them, there is no room for doubt, even although bills have only been accepted for the price of the goods, and these are not yet due,—provided the person who has accepted them, either is in good circumstances, or is not insolvent, or in doubtful circumstances.¹

But there may be numerous cases, in which the bills of lading may be indorsed and delivered, not in the fair way of trade, but for some fraudulent purpose, and with the view of defeating this right of the original owner. As, where the bill of lading has been indorsed upon some confidential understanding, and the party to whom it is indorsed, is in the knowledge that the person doing so is in insolvent circumstances, or that the price has not been paid, and that there is no likelihood of its being paid,—or that no bill has been accepted for the price,—or, though a bill has been accepted, that it is not likely to be paid. In such cases, the person taking the bill of lading is entitled to no privilege;—he stands in the same position as the original holder, and his interposition being, under these circumstances, in fraud of the right of the original seller or consignor, will not be available to defeat it. On the one hand, when the indorsement is honestly and fairly taken, for a valuable consideration, without notice of any circumstances which would render the bill of lading not fairly and honestly assignable—and although the indorsee knows that a bill has been accepted for the price, and is not yet payable, but he has no reason to apprehend that the person accepting it is likely to fail, and not pay the money in

¹ *Cumming v. Brown*, 1808; 9 East. 506.

due course,—the original owner is not entitled to prevent delivery of the goods. But, on the other hand, if the party has assisted in contravening the actual terms of the bargain or sale, on the part of the original owner, or has reasonable expectations arising out of them, or has rights connected therewith,—as where he knows that the buyer or consignee is in insolvent circumstances, or that no bill has been accepted for the price, or that being accepted, it is not likely to be paid,—then he stands in the same situation as the party with whom he deals, and the original owner is entitled to prevent delivery of the goods.² Where, therefore, the party taking the indorsement to the bill of lading, has notice of the insolvency of the party from whom he receives the bill,—the right of stoppage is not taken away.³ Where, also, the party taking the bill of lading, makes himself a partner in the transaction with the original buyer or consignee,—as by engaging to pay for the goods, and divide the profits,—he is not entitled to prevent the exercise of the right of stoppage.⁴ And where the bill of lading was specially indorsed, “deliverable to A. B., if he should accept and pay the accompanying” draft; if not, to the holder of the draft; A. B. accepted the draft, and then indorsed the bill of lading to another person for a valuable consideration, but he did not pay the draft when it became due;—it was held, that the conditional indorsement made it incumbent on the purchaser to inquire, whether the condition had been actually performed,—and that, not having done so, he had acquired no property in the goods.⁵

If, after the termination of the voyage, the buyer or consignee place his mark on the goods, this is held to be virtually taking possession of them by him, so as to exclude the right to stop them;⁶ but this must be done at the natural termination of the journey; and if done at any time before that, or even although the buyer or consignee obtain possession of them previous to such

² Abbot, 535.

³ *Virtue v. Jewell*, 1814; 4 Camp. 315.

⁴ *Solomons v. Nisson*, 1788; 2 T. R. 674.

⁵ *Barrow v. Coles*, 1811; 3 Camp. 92.

⁶ *Ellis v. Hunt*; 3 T. R. 464.

termination, his doing so will not deprive the seller or consignor of his right.⁷ Where the buyer or consignee anticipates or foresees his coming bankruptcy, he may take them into his own warehouse, merely for the sake of keeping them, and in that case they can be stopped;⁸ and, where the goods are placed in the Queen's warehouse, until the duties are paid, during which time the consignee becomes bankrupt, the goods can be effectually stopped.⁹

In the case of goods consigned to a factor, and the bill of lading transmitted to him, he can obtain a loan or advance of money, upon the pledge or security of the bill of lading, if honestly and fairly made, which will also cover any further or continuing advances in respect thereof, although the person making the advances, and claiming the pledge or lien, has notice that the party with whom he contracts is only an agent.¹ The securities for such loans may be exchanged;² but only such loans, advances, and exchanges are protected by the statute, as are made honestly and fairly, and without notice that the agent obtaining the loan in advance, has no authority to do so, or is acting in bad faith in respect thereof, against the owner; and the statute will not extend to or protect a lien or pledge for a previous debt, owing from the agent to the person receiving the lien or pledge; nor to authorise any agent entrusted with bills of lading, in deviating from the express orders or authority received from the owner.³ But the owner is entitled to redeem the pledge or lien,⁴ and this pledge does not *absolutely* defeat the owner's right to stop the goods,—for, although the legal right to possession of the goods passes to the person advancing the money, yet the owner has still an interest in the goods, and can claim any balance that may remain after repaying the money advanced; and should the agent have pledged any goods of his own, along with those in

7 *Holst v. Pownall*, 1794; 1 Esp. 242.

8 *Steins v. Hutchinson*, 18th November, 1810; F. C.

9 *Northey v. Field*, 1798; 2 Esp. 613.

1 5 & 6 V., c. 36, § 1.

2 *Ibid*, § 2.

3 *Ibid*, § 3.

4 *Ibid*, § 7.

the bill of lading, the owner of these latter goods is entitled to have the other goods sold, and the proceeds applied to the claim, before his own goods are applied to that purpose. As, when a bill of lading, and also goods to a considerable value were pledged for advances to the consignee, but, on his bankruptcy, the master of the ship claimed to stop the goods in the bill of lading, as *in transitu*; and it was held, that the consignor of these goods had a right to insist upon the proceeds of the goods belonging to the consignee being applied to the discharge of the lien, which the party making the advances had; and as they proved sufficient to satisfy it, that he had a right to receive the entire proceeds of his own goods.⁵

I have thus given you a brief outline of the doctrine of stoppage *in transitu*, which has much engaged the attention of courts of law, and which will often arise in practice, and of which, therefore, it is of great importance that you should have such a knowledge as will enable you to act with safety, in the different circumstances in which that right may be exercised. Let me here present you with a short summary of the doctrine:—this stoppage can only be made by an unpaid seller or consignor, or by his agent, or other person in his right, or by a person who, in an equitable view, is to be held as seller or consignor, and where the buyer or consignee is bankrupt or insolvent, or, at least, changed in his circumstances; nor is this right taken away by part of the price being paid, or by bills being granted for it. The notice of this stoppage may be given either by word or in writing, although it ought to be in writing, and it can also be done by judicial authority; but it must be given to the shipmaster, and not to the shipowner, nor to the person to whom the goods are to be delivered; and it must be given while the goods are in the course of their voyage or journey, and before they have come into the actual possession of the party who was to receive them, or before that party has done any act in relation to the goods, which is held, in law, equivalent to his taking possession of them.

⁵ In the matter of *Westzynthius*, 1833; 5 B. Ad. 817.

I will, immediately afterwards, consider in regard to delivering the goods, which have been so stopped, or landing them from the vessel at the termination of the voyage; but I would previously recommend to your serious attention what has been said, in this letter, as to the law of stoppage *in transitu*.

I am, &c.

LETTER XVII.

Port of destination—duty in taking a pilot—signals made for pilots—when no pilot can be got or be had—clause of general pilotage act—where vessel has to perform quarantine—port of discharge in hands of enemy—intercourse with port of destination prohibited—port of destination blockaded—if known to master or owners—knowledge not to be presumed—instance of—notoriety of blockade—instances of—knowing before sailing—when voyage not illegal—instances of—no excuse for not sailing—instances of—breach of blockade—instances of—does not discharge from performance of contract—nor put an end to contract—master bound to have on board all papers and documents necessary—bill of health—licenses—general rule as to—when pratique must be received—instances of—vessel must be moored or anchored safely—delivery of cargo—must be in terms of bills of lading—in good condition—responsibility of master—cargo of grain—to whom cargo to be delivered—must adhere strictly to engagement with shippers—only to be delivered on production of indorsed bills of lading—instances of wrong delivery—delivery to party presenting bill of lading indorsed in full or blank—bills of lading under conditions—instances of—bill of lading to order of consignee or purchaser—may not be entitled to receive possession—instances of—bill of lading to agent of consignor—in hands of onerous indorser—when goods consigned for special purpose—instances of—in cases of doubt, how master should deliver—protest by master—use of—lay days—when they commence—particular place mentioned, or left to selection of master—instances of—protest on expiry of lay days—demurrage—rate of—when not due—what no defence, to claim of—goods in general ship not got out—rule as to demurrage—when action for, can be brought by master.

GENTLEMEN,

I may now assume, that the voyage is drawing to a conclusion, and that you are approaching your port of destination. Let us see, then, what is your duty in entering that port.

In a previous letter, I have treated of the subject of pilots, and have given you the laws and regulations relative to their employment, although these relate, more particularly, to the employment of pilots on the coasts

and at the ports of this country. But you will recollect the general rule, that, during the voyage, and, more particularly, in entering the port of destination, you must take a pilot on board, when the vessel is in the limits of a pilots' establishment,—or where, either by usage or the laws of the country, a pilot is required.¹ This is a duty which you owe, not only to your owners, but also to the shippers and insurers, and which, for their interests, as well as for the safety of yourself and crew, you ought anxiously to discharge,—not only by taking on board a pilot at the place where, during the course of the voyage, a pilot is required by law or custom to be taken; but you should not enter the port of destination without having a pilot on board, or at least, without having made, and kept flying for the requisite space, the usual signal for a pilot, or without having used all due diligence, and adopted all practicable means for obtaining one. I need scarcely add, that, as a matter of course, you must preserve evidence in the log-book of having done so.

But, put the case, that you have kept a signal flying for a sufficient, or more than a sufficient, length of time, and that you have used every endeavour to obtain a pilot, before entering the port of destination, and that owing to the tempestuous state of the weather, or some other unsurmountable cause, the signal is not observed, and no pilot comes off, and the vessel cannot with safety remain in the offing,—what, then, are you to do? The only answer is, that, if you are a person of competent skill, as a master, as the law presumes you to be, you are entitled yourself to conduct the vessel into port. This answer will be confirmed and illustrated by the following case,—which was an action upon a policy of insurance, at and from Liverpool to the ship's port or ports of discharge in Sierra Leone. The vessel arrived off the river Sierra Leone, where there is a regular establishment of pilots, at three o'clock in the afternoon, and the master then hoisted a signal for a pilot; but, at ten o'clock, no pilot having come on board, the master attempted to enter the river, and in doing so, the vessel

¹ *Law v. Hollingworth*, 1797; 7 T. R. 160.

struck the ground and was lost; it was left to the jury, whether the master, in entering the harbour without a pilot, did what a prudent man ought to have done under the circumstances,—and a verdict having been found for the plaintiff, Lord Tenterden, Chief Justice, observed :—
 “ It may be conceived, that a vessel *coming out of harbour*, must have a pilot, because the captain always has it in his power to procure one; but it seems to me, that if the master of a vessel, *arriving off port*, use due diligence to obtain a pilot, he does all that can be required by law. Here, the vessel arrived at Sierra Leone, about three o’clock in the afternoon; the captain hoisted signals for a pilot, and at ten no pilot had come off. It seems to me, that, upon the evidence, the master did use due diligence to obtain a pilot, and having done so, it was competent for him to exercise his discretion,—whether it were better to run the risk of entering the harbour without one, or to wait till the following day for a pilot. Here, acting to the best of his judgment, he attempted to enter the harbour without one, and, in so doing, the vessel was lost; and, I think that the underwriters are liable for a loss happening under these circumstances.” And Parke, Justice, observed :—“ If a vessel sails to a port, where the establishment is such that it is not always possible to procure the assistance of a pilot, before the vessel enters into the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all that I can require in such a case is, that the master use all reasonable efforts to obtain one.”²

And, by section 56 of the General Pilotage Act, it is enacted, “ that nothing in this act shall extend, or be construed to extend, to deprive any person or persons, of any remedy or remedies, upon any contract of insurance, or of any other remedy whatever, which he or they might have had, if this act had not passed, by reason or on account of no pilot, or of no duly qualified pilot, being on board of any such ship or vessel, unless it shall be proved, that the want of a pilot, or of a duly qualified pilot, shall have arisen from any

² Phillips v. Headlam; 2 B. Ad. 383.

"refusal to take a pilot, or a duly qualified pilot on board, or from the wilful neglect of the master of such ship or vessel, in not heaving to, or using all practicable means consistently with the safety of such ship or vessel, for the purpose of taking on board any pilot who shall be ready and offer to take charge of such ship or vessel."

If the vessel is obliged to perform quarantine, before entering the port of discharge, the cargo must be properly aired, and taken care of during that time. At the port of London, the practice is, in such cases, for the consignee to send down persons, at his own expense, to pack and take care of the goods, and if he omit to do so, and the goods are damaged by being sent loose on shore, he has no claim for compensation against the master.³ But I apprehend, that, in general, and where there is no special usage to the contrary, it is the duty of the master, while the vessel is performing quarantine, to take the same charge of airing and attending to the cargo, as he must do during the course of the voyage.

If the port of discharge should be found to be in the hands of an enemy, and part of the cargo would be seized on entering, although the other part of it would not be so seized, the master is at liberty to go to the nearest port, where the cargo can be landed with safety, provided it is so landed with the intention of sending on the part that would have been seized, to the original port of destination; and should that part be lost, or destroyed by fire, in the interval, the underwriter will be liable.⁴

Should all intercourse with the port of destination be prohibited, or should the importation of these particular goods not be allowed, the contract of affreightment with the shipper is not thereby at an end, but you will be entitled to return to the port of lading with the cargo, and the shipper will be liable for the freight.⁵

If the port of destination is blockaded, and should the blockade have been known before sailing, this, of itself, will render the voyage illegal, both to the shippers and

³ Abbot, 390.

⁴ Dunlop v. Allan, 24th November, 1785; M. 7097.

⁵ Christy v. Row, 1808; 1 Taunt. 300.

owners, provided the blockade is a real and effective,—not merely a nominal or a relaxed blockade; and the act of sailing to a blockaded port, with an intention to break the blockade, will have the same effect. But it is always a question of fact, which must be proved, whether or not the blockade was known to the owners or master before sailing; and this knowledge will not be presumed, merely from the circumstance of the blockade having been officially notified to the government of this country, unless a reasonable time has elapsed, after that notification, before sailing, or unless the knowledge of the blockade can be traced to the master. Thus, in an action on a policy of insurance on goods, at and from Liverpool to Buenos Ayres, it was proved that the vessel sailed from Liverpool on the 4th of February, 1826, but, having received damage, put into a port on the west coast of Scotland, on the 19th February, to repair, and sailed from it on the 12th March; in the interval, the master had gone to Greenock, and was absent five days:—the blockade of Buenos Ayres was notified in the *London Gazette* on the 18th February, and the insurance was effected on the 22nd of that month; the vessel arrived off Monte Video in May, and the master, on observing a number of ships together by night, dropped anchor, and waited till daylight for further information, when the vessel was taken by the squadron stationed for the blockade of Buenos Ayres, and carried into Rio de Janeiro, where the cargo was taken out, and put into government stores: but there was no knowledge by the master of the existing blockade, till the ship came up to the blockading squadron by night:—the insured was found entitled to recover, because the knowledge of the captain was not to be presumed on the principle, that notice to a state is notice to all its subjects.⁶

But when a blockade has existed for such a reasonable time, as to make it a subject of general notoriety to neighbouring states, this will be sufficient to affect the subjects of these states; and this knowledge must be presumed from reasonable grounds of evidence. As, where, during a blockade of Amsterdam, a Bremen vessel was captured

⁶ *Harratt v. Wise*, 6th July, 1829; 9 B. C. 712.

on her voyage outward from Amsterdam, in breach of the blockade;—it was held, that as the blockade existed in fact, and could not have been unknown to the vessel, she had been guilty of a breach of the blockade, although no notification of it had been made to the Hanse Towns.⁷

However, if there is no intention, previous to sailing, of breaking the blockade, and the intention is, to inquire at some port of the blockading country, as to the continuance of the blockade, this will not be illegal, as there is no intention of violating the blockade. As, where a vessel was insured at and from Liverpool, to any port or place in the river Plata, with liberty, in the event of a blockade; or being ordered off the river Plata, to proceed to any other port, and there wait, or discharge. On the 11th March, the vessel sailed from Liverpool, and was proceeding up the river Plata, to Buenos Ayres, where she met with a Brazilian frigate, below Monte Video, and was detained and sent into Monte Video, and after remaining for some time, was sent to Rio de Janeiro for adjudication. The notification of blockade of the ports in the river Plata, belonging to the government of Buenos Ayres, by the Emperor of Brazil, was published in the *London Gazette*, on the 18th February;—and, in an action on the policy, it was held, that, as it was a part of the original intention to inquire as to the continuance of the blockade, at some port of the blockading country, the voyage was not in contravention of the law of nations, and a vessel may lawfully clear out for the blockaded port.⁸

If it was known at the time of entering into the charter-party, that the port of destination was in state of blockade, this will be no defence to the shipowner, for not sailing on the agreed-on voyage to that port; and, therefore, where a vessel was chartered to proceed to Terceira, which port was, at the time, in a state of blockade by the government of Portugal, and the blockade had been notified to the English government, so that the parties entered into the charter-party with an equal knowledge of its existence; but there was no evidence of any under-

⁷ *The Adelaide*; 2 Rob. 111.

⁸ *Naylor v. Taylor*, 6th July, 1829; 9 B. C. 718.

standing that the master was to break the blockade of Terceira, in order to deliver the outward cargo :—it was held, in an action on the charter-party, that no difficulty attending the performance of the contract can be set up, as an excuse for its non-performance.⁹

What will amount to a breach of blockade,—whether it be a blockade in law or in fact,—will depend on circumstances. You may take a few examples of what, during the late wars, were held to be breaches of blockade, and which, should such an occurrence happen again, may guide you in such a voyage. For instance, it has been held, that warning on the spot is sufficient notification of a blockade existing in fact; and that, in such circumstances, a violation of the blockade, by the master, affects the ship, but not the cargo, unless the owners of the cargo knew that the cargo was an intended violation of the blockade;¹—that a master coming out of a blockaded port, with a cargo, is liable;²—that the drawing near to a blockaded port, with the determination to go close in under shore, though for the ostensible purpose of taking a pilot, is not allowed;³—that a deviation to the vicinity of a blockaded port will not be admitted, if the master acts in such a manner as shows, that his doing so does not proceed from justifiable ignorance;⁴—that this deviation into a blockaded port will be presumed to be in the service of the cargo, so as to produce a condemnation of it;⁵—that if the master goes voluntarily into a blockaded port, the sale of the cargo, by compulsion, in that port, will not be a sufficient excuse;⁶—and that even a neutral vessel in ballast, is not at liberty to proceed to a blockaded port, for the purpose of bringing away a cargo, purchased before the commencement of the blockade.⁷

But, although the port of destination be in a state of

⁹ *Medeiros v. Hill*, 27th January, 1832; 6 Bing. 231.

¹ *The Mercurius, Gardes*, 10th Dec., 1798; 1 Rob. 89.

² *The Frederick Melke, Boyson*, 10th Dec., 1798; 1 Rob. 86.

³ *The Charlotte Christine, Petersen*, 1st August, 1805; 6 Rob. 101.

⁴ *The Adonis*, 4th Sept., 1804; 5 Rob. 256. *The Neutralitat*, 9th May, 1805;

6 Rob. 30. *The Gute Erwartung, Gay*, 30th October, 1805; Ib. 182.

⁵ *The Alexander*, 13th November, 1801; 4 Rob. 93.

⁶ *Byfield, Foster*, 9th December, 1809; Edw. 188.

⁷ *Comet, Mix*, 25th October, 1808; Edw. 32.

blockade, this, as you have already seen, does not discharge you from performance of your part of the charter-party; and certainly does not put an end to that contract for the conveyance of the goods, although it may operate as a temporary suspension in the performance of it. It is, therefore, the general rule, that, where the obstacle is of this temporary nature, the master is entitled to wait for the removal of it, so as he may deliver his cargo and earn his freight, unless the cargo be of a perishable nature, and cannot endure the delay.⁸ In such a case of a perishable cargo, there can be no doubt that the master is entitled to proceed to the nearest neighbouring port, where the cargo can be advantageously disposed of, for the best interest of all concerned, as this seems to fall under the case of necessity, which authorises the master to dispose of the cargo.

Under the expression, to furnish the vessel "with everything needful and necessary for the voyage," you are bound to procure, and have on board, all the papers and documents which are necessary or required, for the proof of the property and protection of the ship and cargo, by the law of the countries from and to which the vessel is sailing, and by the law of nations in general, and by the treaties between these particular states.⁹ If the vessel has sailed from a suspected port, or if there is a general alarm at the port of destination, and a bill of health is required, before the vessel can be admitted, it is your duty to provide yourself with this necessary document; and should the vessel be excluded from her port of destination, on account of her not being provided with this bill of health, you and your owners will be responsible.¹ In like manner, also, during time of war, it was necessary, in trading to certain countries, or with certain ports, to have a license or licenses, by which the trading, which would otherwise have been illegal, was legalised. As to these licenses, the general rules were—that the terms and conditions, upon which the license was granted, must be strictly complied with;—that, when any qualification is inserted, that must be strictly conformed to;—

⁸ Abbot, 600.

⁹ Abbot, 347.

¹ Levy v. Casterton; 1 Stark, 212.

that the party using the license must show that he was authorised to obtain it, and how he obtained it;—but that any fraudulent alteration of the license avoids it, even when the protection of it is claimed by a party innocent of the fraud;—although when, by unavoidable accident, the voyage is delayed beyond the time specified in the license, yet, should the license adventure be honestly pursued within any part of the period, the voyage is protected.²

If the vessel is to proceed to a port at which there is a quarantine establishment, or at which the vessel must perform quarantine, it is a common condition, that the running days are only to commence when the vessel is ready to unload, or has received pratique. In one case in which there was no quarantine establishment at the port of destination, nor any means of formally granting pratique,—the fact that the vessel was at liberty to unload by a certain day, was a sufficient proof that the vessel had received pratique.³

When the vessel has arrived at her port or place of destination, the master must moor or anchor the vessel safely, according to the custom of the port or place, and make ready for delivering her cargo. That delivery must be made also, according to the custom of the port or place, either at a wharf, over the ship's side, or in boats. If, in the latter case, the goods in the boats should be lost in their way from the ship to the shore, the effect will be the same as if they had been lost during the voyage; and, therefore, if the goods are landed in boats, according to custom, at that port or place, and if the goods in the boats be lost by a peril of the sea, neither you nor your owners will be liable.⁴ If, however, damage arises in the act of delivery, from sea-water, insufficiency of tackling, or carelessness of the crew, or the like, the merchant will have his claim of damages.

The goods must be delivered in terms of the bills of lading, and in as good condition as they were received

² Park, 512-19.

³ *Balley v. De la Arrogave*, 26th January, 1838; 7 A. E. 919.

⁴ *Johnson v. Benson*, 1819; 1 B. B. 454.

on board; unless, in signing the bills of lading, you have taken care to relieve yourself from responsibility, by writing,—“quantity and quality unknown,”—“contents unknown,” or “not liable for corruption.” If the bills of lading bear the goods to be of a certain number and weight, you are responsible for the delivery of the same number and weight; and if the goods have been received with the word “glass” marked on them, you should use the precaution of satisfying yourself, that the goods are whole and sound before receiving them on board,—as, if delivered damaged or broken, you will be responsible, although, if you have not so satisfied yourself, that might have been done before they were received on board. In cargoes of grain, the exact quantity of which has to be ascertained by measurement, difficulties may arise,—from the effects of heat and moisture—or the motion of the vessel,—or from the variations in weights and measures,—whether any deficiency may not have arisen from these causes, or from actual embezzlement, which must be proved.

Doubts may, however, arise, as to who is the proper party to whom the goods should be delivered. The general rule is the safe one,—that you can rarely be wrong, or incur responsibility, by adhering strictly to the terms of your engagement with the shippers.⁵ When the bills of lading are made deliverable to the shipper's own orders, the usual practice is, to send one of the bills of lading *unindorsed* to the consignee, as intimation of the shipment, and another part, *indorsed*, to the shipper's own agent, to be delivered to the consignee, on his complying with the condition upon which the consignment has been made,—as, by accepting bills for the amount. The property of goods shipped on bills of lading in these terms, does not belong to the consignee, until he perform the conditions upon which he is entitled to possession of them; and, therefore, a master cannot safely deliver the goods, unless upon production of the bill of lading, indorsed by the shipper, to whose order he became bound to deliver them. Of course, as a carrier merely, it is not for you to determine to whom

⁵ Abbot, 337.

the property of the goods belong, nor is it necessary you should mix yourself up, with the nice questions that may arise as to the right of property in the goods. Your duty is, to make a safe and sure delivery to those entitled to it; and you must, therefore, take care that the delivery is such, as to discharge you and your owners from all further liability. For this purpose, it is essential when bills of lading are signed, deliverable to the shipper's orders, that delivery should be made only on production of an indorsed bill of lading. For instance, orders were sent to Russia, to purchase a cargo of corn, with instructions to draw for the amount on a house in London; the shippers in Russia informed the person from whom they had received the orders, that they had shipped it on his account, and that they had forwarded an *indorsed* bill of lading, to the house in London, and had drawn upon them for part of the price, and upon himself for the residue; they also sent him an *unindorsed* bill of lading, and an invoice of the corn, stating it to have been bought for his order, and on his account; the bills were dishonoured, upon which the shipper's agent in London delivered the indorsed bill of lading to the house there; but the shipmaster delivered the cargo to the person who had sent the orders, and not to the house in London, pursuant to the bill of lading;—in an action against the shipowners, for not delivering pursuant to the orders of the house in London, it was held, that the property did not vest in the person who sent the orders, absolutely, upon the shipment, but only subject to the condition that the bills were accepted; and that as they were not accepted, it never did vest in him; and that the house in London were, therefore, entitled to recover from the shipowners the value of the grain at the time it was delivered to him.⁶

Take another case, which, though it was not an action against the shipowners, yet involved the question of an improper delivery being made by the shipmaster.—A consignee abroad received orders from his correspondent in this country, and shipped goods on his account and at his risk, taking the bills of lading from the master

⁶ *Brandt v. Bowlby*, 18th November, 1831; 2 B. Ad. 932.

6th April;—and it was held, that the third party—plaintiff or pursuer—was entitled to the sugars;—because, 1st, the planter had not parted with the property by delivering the sugars on board a ship, so employed, as above stated;—2nd, nor by accepting the bill of lading, as drawn on the 4th April, by the captain, the planter being entitled to change the destination of the sugars, till he had delivered them or the bill;—3rd, and, that the letters to the shipowner did not show an intention to consign the specific property to him; and that, for these reasons, (strengthened by proof of intention in the planter's letter of the 4th April,) the indorsement to the third party passed the property.¹

These instances may show you, the care which ought to be exercised, in delivering the goods to the party who has legal right to them, and who is legally entitled to receive them; and I will immediately show you the course which, in these and other the like cases, ought to be followed.

I have said, that, when goods are shipped to the order of the shipper, or —, or assigns, delivery of the goods should not be made, unless to the party who can produce an indorsed bill of lading; but goods may be shipped on bills of lading, taken to the order, and on account and risk of a consignee or purchaser, and yet he may have no right to receive possession of them,—he not having complied with the condition—as accepting drafts for the price—on which they were so shipped. As, for instance, parties sold wheat to purchasers, for which the purchasers were to pay by a draft on a London banker; and the sellers delivered the wheat to a carrier, and sent a bill of lading to the purchasers; but, before the wheat came to the purchaser's possession, the sellers took it again and sold it, because the purchasers failed to send a draft on a London banker; and it was held, that the purchasers could not pursue the sellers for delivery of the wheat.² In a case already referred to,³ the goods were deliverable to the shipper's own order, and

¹ Mitchell v. Eades, 5th May, 1840; 11 A. E. 888.

² Wilmhurst v. Bowker, 8th May, 1839; 5 Bing. N. C. 541.

³ Brandt, *ut sup.*

an unindorsed bill of lading was transmitted to the purchaser, and an indorsed part to the shipper's agent in London, to be delivered to the purchaser on his giving security by bills for the price; he refused to do so; but, after the shipper's agent had claimed the goods on arrival, the master delivered them to the purchaser, on his assurance that he was entitled to them as purchaser, and that they were shipped on his account, and to his order; and the shippers were found entitled to recover the value of them from the shipowners. And, in another case now referred to,⁴ although the shipment had been made, and a bill of lading granted, deliverable to a person named, it was held that the shipper could attach conditions to the consignment, or even revoke it, before the bill of lading, or the goods, were actually delivered to the consignee.

Where goods have been consigned to an agent of the consignor, without being for any special purpose, it may often turn out to be a difficult question,—depending upon the state of accounts between the principal and agent,—whether you can be safe in delivering the goods to the agent. These are matters which it is not to be expected you are to enter into; but if the agent has indorsed the bill of lading for value, there is no doubt that the onerous indorsee is entitled to receive the goods, independently of the shippers, unless he had notice of some circumstance to prevent him from honestly and fairly accepting of the indorsation.⁵ Where, however, the consignment has been made for a special purpose, or to cover advances previously made by the agent, he acquires a special property in the goods, from the time of delivery on board; and you are answerable to him for delivery. As, where a manufacturer at Newcastle consigned goods to his agents in London, specifically to meet a bill drawn upon them, and transmitted to them a receipt signed by the mate of the vessel, acknowledging the goods had been received on board to be delivered to them;—it was held, that the appropriation of the goods was complete, and that the shipowners were liable, in delivery, to the

⁴ Mitchell, *ut sup.*

⁵ Cuming v. Brown, 6th May, 1808; 9 East. 506.

consignees.⁶ Where, also, bills of lading to the shipper's orders, indorsed in blank, were forwarded to the consignees,—a banking-house,—in security for advances agreed to be made to the consignors, and the consignors having become bankrupt, their assignees claimed and obtained the goods from the shipmaster; but it was held, that he was liable to make delivery to the consignees.⁷ And, where goods were shipped, and bills of lading signed and transmitted to a factor, and it was proved, by the correspondence, to have been the intention of the principal to vest the property in the factor, as a security for previous advances made by him,—it was held, that the factor had acquired a special property in the goods as soon as they were shipped on board, and that he was entitled to sue the master of the ship for them.⁸

But, neither you nor your owners are called upon to investigate or decide upon the right of the party who may be best entitled to the goods. You are merely the carrier—a middleman—who has undertaken to deliver the goods, in terms of your engagement in the bill of lading, and to make delivery in terms of it; and, when you do so, the shipper has very little ground to complain. Should the person to whom the goods were to be delivered, and who holds the bill of lading, have failed, or be notoriously insolvent, you should deliver to the person whom the consignor has duly authorised to receive them, under a guarantee to relieve you of all responsibility in doing so. If the shipper has indorsed the bills of lading to different persons, you will be warranted in delivering to the person to whom he has first made the indorsement.⁹ Should two or more parties claim right to the goods, these should be delivered to the one who can give you the best security, upon which you can rely, to indemnify you against the consequences of your so delivering them. And should none of these methods be practicable, or should the goods be stopped *in transitu* by the shipper, or should a holder of a bill of lading not

⁶ *Evans v. Nicholl*; 4 Scott, N. C. 43.

⁷ *Halle v. Smith*, 1795; 1 B. P. 513.

⁸ *Anderson v. Clarke*; 2 Bing. 30.

⁹ *Caldwell v. Ball*; 1 T. R. 205.

appear during the lay-days, you ought then to deposit the goods with a wharfinger or warehouseman, in your own name as master, in security of the freight and charges. In any of these ways, you can free yourself and owners from all responsibility as to the goods, or from any question as to the party best entitled to them.¹

It is usual, on the arrival of the vessel at her port of discharge, for the master to take to a protest against wind and weather, as it is called, in presence of a notary public, or a British consul, where there is no notary. This protest is merely a narration, from the master's information, of the particular occurrences of the voyage,—of the storms or rough weather which have been encountered,—of the accidents which may have occurred,—and of the probable damage which may have been sustained from these causes. However proper and necessary it may be for you thus to protest, and whatever credit may be given to an instrument of protest, when free from all suspicion, amongst merchants and underwriters, yet these protests are not received in the courts of law in this country, as evidence for you or your owners, although it may be used as evidence against you; and, therefore, you should be prepared to support the statements in it, by the evidence of your log-book, of yourself and mate, or some other of your trustworthy seamen.²

Before proceeding to the subject of freight, in the next letter, I may here notice the lay-days allowed at the port of discharge, and the demurrage that may be incurred there.

Referring to what I have already said, as to the manner in which the lay-days may be mentioned,—where a certain number of lay-days are stated in the bill of lading, or charter-party, and what is to be understood when the usual ordinary lay-days only are allowed,—it is necessary for you to bear in mind, that the lay-days only commence from the time of the vessel's arrival at the usual place of discharge in the port, and not from the time of her arrival in port merely;³ and that if the

1 Abbot, 337, 540.

2 Abbot, 880.

3 *Brereton v. Chapman*; 7 Bing. 539.

usual place of discharge be in a dock, the lay-days commence from the time of her arrival in the dock, and not of her coming to her berth.⁴

A particular place may be stipulated for the delivery of the cargo, or one of two places may, according to circumstances, be left to the selection of the master; and, where the former is fixed, the lay-days—as in the case of the vessel's arrival at the usual place of discharge in a port, or her arrival in a dock—will run from the vessel's arrival at the place so stipulated; and, in the latter case, from the arrival of the vessel at that place which the master has selected. Thus, where it was agreed to convey a cargo to Oporto, and if the river was in possession of an enemy, to unload at Foz, outside the harbour, or at some other port near the bar, where the vessel could lie in safety; the freight was to be £475, or, if the vessel could not enter Oporto, and discharge there, only £300; twenty-five working days were to be allowed for unloading, to commence when the ship was off the castle of Foz, or other point where she was to be discharged,—to continue whilst there,—to cease if blown off the coast by stress of weather,—and to recommence when again at anchor at her station;—the vessel arrived at Foz on 3rd June, and, an enemy being in possession of the river, commenced unloading there; the vessel was detained there, partly for the freighter's convenience, and partly by being obliged to slip her cable in bad weather, till 25th August,—and, by that time, had discharged seven-eighths of her cargo;—the enemy had then quitted the river, and the vessel entered Oporto, and discharged the remaining part of her cargo:—in a question under the charter-party, as to the commencement of the lay-days, it was held, that, by the charter-party, they were to commence at the castle of Foz, or other point, where the vessel was to be discharged,—to cease if the vessel be blown off the coast,—and to commence again on her regaining her station.⁵

On the expiry of the lay-days, either fixed, or usual and customary, at the port of discharge, it is prudent

⁴ *Brown v. Johnson*, 13th June, 1842; 10 M. W. 331.

⁵ *Gibbons v. Buisson*, 17th November, 1834; 1 Bing. N. C. 263.

and proper to take a protest against the consignee, or other party receiving delivery of the cargo, intimating to him,—the date of the vessel's being ready to discharge,—the number of days allowed for unloading,—the date of the expiry of these days,—and that the vessel then commences to lie on demurrage,—so as to fix with certainty the precise days, and avoid future dispute as to these. The rate of demurrage per day is usually fixed at a certain sum in the charter-party or bill of lading, and this rule is to be taken as the measure of the compensation to be allowed; but it is open to the shipowner to show that more expense and loss has been incurred, and to the freighter to show less has been incurred.⁶ But, when the stipulation is, that the vessel is to be unloaded within the usual and accustomed time, and the vessel arrived in the docks, but, owing to the crowded state of the docks, could not get a berth for a considerable time,—the merchant will not be answerable for a delay of this sort,—although, by bonding the goods, and immediate payment of the duties, they might have been landed in a much shorter time.⁷ It will be no defence, however, to this claim for demurrage, that the goods could not be landed without a special order from the Lords of the Treasury,—it being the duty of the merchant to obtain such an order;⁸ or that the delay in completing the unloading, was caused by an improper act of the custom-house officers.⁹

In the case of a general ship, however, where the shippers are allowed a certain number of days to take out the goods,—it may often be impossible, that particular goods can be got at, to be discharged within that time; and although it was once held, that, notwithstanding it was not the fault of the merchant, but of the master himself, that his goods were not got out, until other goods which lay above them, were got out, still the merchant was liable in demurrage;¹ yet, the better opinion,

6 *Moorsom v. Bell*, 1811; 2 Camp. 616.

7 *Rogers v. Forrester*, 1811; 2 Camp. 488. *Burmaster v. Hodgson*, 1811. *Ib.* 488.

8 *Hill v. Idle*, 1815; 1 Stark. 111.

9 *Beasey v. Evans*, 1815; 4 Camp. 131.

1 *Leer v. Yates*, 1811; 3 Taunt. 367.

—and an opinion more agreeable to common-sense,—seems now to be that, “if a consignee cannot get his goods, because some other person’s goods prevent him, he is not liable for the delay of the vessel;”² and that, “if the goods of the particular consignee are not ready for discharge at the time of the ship’s arrival, he must have a reasonable time for removing them after they are so. If, in such a case, using reasonable despatch, he cannot clear them, within the stipulated period, from the ship’s being ready to discharge her cargo, generally, he will not be liable for demurrage, till the expiration of such a reasonable time; but when it is expired, he will be liable, though the stipulated period, if computed from the time when the discharge of his own goods could have commenced, was not at an end.”³

As master, you cannot maintain an action in your own name,—where the goods have been delivered to a consignee, under a bill of lading, “on payment of freight,”—against the consignee, on any implied or understood agreement or contract, on his part to pay demurrage;⁴—although this might be easily obviated, by inserting, on the margin, that a certain number of days is to be allowed for unloading, or demurrage paid, at a certain rate per day.⁵

I am, &c.

² Dobson v. Droop; 1 M. M. 441. ³ Rogers v. Hunter; 1 M. M. 63.

⁴ Evans v. Foster, 30th June, 1830; 1 B. Ad. 118.

⁵ Jesson v. Solly; 4 Taunt. 52.

LETTER XVIII.

Freight—earning of—goods must be carried to port of destination—vessel disabled—goods damaged—voyage divided—entire voyage—rateable freight—goods received at intermediate port—or carried on by shippers—abandoned to insurers—voyage not commenced—slump freight—must load to actual tonnage of vessel—voyage on time—risk of duration—freight paid beforehand—if, can be recovered back—instances of—when it can be recovered—instances of—where no freight can be claimed—instances of—when freight insured can be recovered from insurers—when risk attaches—goods not on board—instances of—goods on board—or contract for putting—how contract may be proved—parties liable to pay freight—consignee—consignor—purchaser taking under bill of lading—exceptions—instances of—liability of consignor—how discharged—bills taken for freight—payment of freight—mode of—lien for—on goods of sub-charterers—no lien for demurrage, &c.—how agreed to be discharged—goods damaged—can merchant abandon goods for freight—dead freight—primage and average.

GENTLEMEN,

I now proceed to the important subject of freight. You are, of course, aware, that freight is not only the subject of contract, as to the conveyance of goods, but that it is commonly also the subject of insurance; and, therefore, while you must be intimately acquainted with the nature of freight, in regard to the former, you should, at the same time, be well acquainted with it in regard to the latter also. Let us attend, then, in the first place, to the earning of freight.

All our writers on this subject agree in this general rule, that the freight cannot be earned unless the goods have been carried,—that the whole voyage must be completely performed,—and the goods delivered at the agreed-on port of destination,—to entitle the owner to his freight.¹ If, therefore, the goods have been carried

¹ Abbot, 406; Holt, 429.

to their place of destination, and delivered there, the shipowner becomes entitled to his whole freight, unless in so far as he has been prevented from completing the voyage, and delivering the goods, by some of the perils insured against, or by other unavoidable accident. And this full freight will be due, although the vessel may have been lost or disabled during the voyage, so as to be unable to complete it, provided the goods are saved, and either carried on to the port of destination, or accepted by the merchant at a place short of that destination, without requiring them to be carried on to that port. Where the ship is disabled by the perils of the sea, and can be repaired, the master can retain the goods, until his own ship be repaired, and in a state to carry them on; or he may hire another vessel, and send the goods on to the port of destination; and, in either case, the full freight will be due, although the goods may have been carried, in that substituted ship, at a less rate than the original freight. But, if the merchant appear, and insist on the goods being delivered to him at that intermediate port, without requiring the master, who is able and willing, to carry them on to the destined port, and so prevents him from fulfilling his part of the contract, which he has a right to insist on doing, the whole freight is due.²

If the goods arrive at the port of destination in a damaged state, arising either from their own inherent corruptibility, or from the perils of the sea, and these are received by the merchant, or given up by him to the underwriters, the whole freight will be due, and he cannot set off the damages against the claim for freight; nor will the merchant be allowed to choose the part of the goods which is not damaged, and to reject the damaged part.³ The right of the merchant to abandon the goods for the freight will be afterwards considered.

Where the voyage is divided into distinct parts, as an outward and a homeward voyage, or from port to port, and freight is to be paid for each distinct part, or so

² *Luke v. Lyde*, 1759; ² *Burr.* 887. *Hunter v. Prinsep*, 1808; ¹⁰ *East.* 378. *Shipton v. Thornton*, 1st Dec. 1838; ⁹ *A. E.* 314.

³ *Lutwedge v. Gray*, 23rd Feb. 1733; ¹ *C. S.* 119.

much per month, and the vessel is lost on the homeward voyage, or after some parts of the voyage are performed, the freight will be due for the outward voyage, or for those parts performed.⁴ But if the whole is one entire voyage, and the vessel is lost on the homeward, or last part of the voyage, no freight will be due;⁵ and if the freight is stipulated to be paid at so much per ton, per calendar month, and what is earned at the time of the vessel's arrival at the first destined port abroad, to be paid within ten days after arrival, and the vessel is lost before her arrival at that port, no freight will be due.⁶

But it may happen that, although the whole voyage has been performed, part only of the cargo has been delivered to the merchant; or, although the whole goods have been received by the merchant, the vessel has not performed the whole voyage; and, in such cases, freight will be due, either according to the quantity of goods delivered, or the proportion of the voyage performed. In the former, where the freight is to be paid at so much per ton or bale, and the whole number agreed on has not been brought, the merchant must pay for the number actually brought.⁷ As, for example,—a vessel laden with seventeen keels of coals, was chartered for a voyage from South Shields to Hamburg, and the freight, at so much per keel, was payable on delivery of the cargo;—the master sailed for Hamburg, and arrived at Cuxhaven, so near to Hamburg that the voyage might have been completed in the course of the day; but, being prevented by the commander of his Majesty's ships from proceeding to Hamburg, which the French forces were then approaching, the merchant's correspondents desired the master to sail to Gluckstadt, and there deliver the cargo: seven keels and one chaldron were there delivered into lighters that were sent, and the vessel staid long enough to have delivered the whole quantity, had lighters been sent to receive it;—but the master was ordered by the British consul, and the commander of his Majesty's

⁴ *Mackrell v. Simond*; *Abbot*, 464. *De Silvalle v. Kendall*, 18th April, 1815; 4 M. S. 37.

⁵ *Mashiter v. Buller*; 1 Camp. 84.

⁶ *Gibbon v. Mendez*, 6th Nov. 1818; 2 B. A. 17.

⁷ *Holt*, 430.

ships, to return to England,—the French having entered Hamburg,—which he did, and landed the rest of the cargo at Shields:—it was held, that the master having been prevented, by one of the restraints excepted in the charter-party, from delivering the whole cargo, he was entitled to a rateable freight for the quantity delivered.⁸

In the event of the master being unable or unwilling to proceed and complete the voyage, and the shippers either receive the goods from the master at the intermediate port, or themselves carry them on to the port of destination, the master will be entitled to a rateable proportion of freight, according to the portion of the voyage performed. Accordingly, it was held, in two of the cases already referred to,⁹ where the merchant took the goods without requiring the master to carry them on, and where the merchants themselves brought the goods on to the port of destination, that the master was entitled to a rateable freight, according to the portion of the voyage performed. In another case, the vessel had been taken, carried into France, and condemned there, and the cargo sold; but restitution being awarded, the proceeds were remitted to the merchants, and freight was found due for the proportion of the voyage which was performed.¹ And in another case, the vessel was stranded, and the shippers abandoned to the underwriters, who took possession of the greater part of the cargo, and sold it; the master was found entitled to such proportion of the freight as might correspond to the part of the stipulated voyage which the vessel had performed, and to the quantity of goods delivered.²

The right to the freight only commences when the vessel breaks ground, and has actually begun her voyage; so that, if she should be lost before doing so, and, even after part, or the whole of her cargo is on board, though without any fault on the master's part, she be prevented from actually commencing her voyage, there will be no claim against the shippers for freight.³ The recovery of

⁸ *Christie v. Row*, 1808.

⁹ *Luke v. Lutwedge*, *ut sup.*

¹ *Baillie v. Moudigliani*; 1 Park, 116.

² *Wilson v. Bennet*, 10th March, 1809; F. C. 86. See also *Mitchell v. Darthez*, 30th January, 1836; 2 Bing. N. C. 556.

³ *Abbot*, 462.

the freight from the underwriters, under a policy of insurance, is a different question, which I will come to by and by. When the vessel does not commence the voyage, any expense of preparing to receive the cargo, or of loading it, must be lost to the owners;⁴ and, as I have already said, in order to entitle the shipowner to his full freight, the voyage must be completed, and the cargo delivered. So, therefore, where, by the charter-party, the master was to deliver the outward cargo at Naples, and, having done so, the freighter was to provide a return cargo, and pay a sum on delivery of the outward cargo, as earned for outward freight; but the outward cargo was seized by the government at Naples, and the master was thereby prevented from delivering it to the consignees of the merchant;—it was held, that the merchant was not liable to pay the outward freight.⁵ In like manner, under a charter-party, the freight, at so much per calendar month of the voyage, was to be paid on the arrival and discharge of the vessel, at her destined port in Great Britain; the vessel sailed on the voyage, and, before her arrival at the outward port, was, without the fault of the master or crew, wrongfully seized by persons unknown, and sent to London, and there detained, but afterwards liberated and restored to the owner; after making the necessary repairs, and properly fitting, victualling, and manning her, he gave notice to the freighter, and offered to prosecute and complete the voyage, requiring him to furnish the necessary directions for that purpose, which he refused to do, or to permit the vessel to pursue the voyage, and wholly renounced the charter-party, and discharged the owner from further prosecuting it;—in an action against the freighter, for the computed amount of the freight, it was held, that the freight being only payable on the arrival and discharge of the ship at her destined port in Great Britain, an offer by the owner to perform the voyage, and a refusal by the freighter, were not equivalent to actual performance itself, and, consequently that the owner was not entitled to recover the freight.⁶ And, in a case already referred to, the

⁴ *Curling v. Long*, 1797; 1 B. P. 632.

⁵ *Storer v. Gordon*, 28th November, 1814; 3 M. S. 308.

⁶ *Smith v. Wilson*, 8 East. 437.

freighter, by the charter-party, agreed to pay freight for the use of the ship, at a certain rate per ton, per calendar month, during the term of six calendar months at least, and so in proportion for a less time than a whole month, and at the like rate for such further time, and until her final discharge in London, or up to the day of her being lost, captured, or last seen or heard of,—such freight to be paid to the master in cash, in the following manner:—so much as might be earned at the time of the arrival of the ship, at her first destined port abroad, to be paid within ten days after such arrival:—the vessel was lost by perils of the sea, before her arrival at her first destined port, and it was held that no freight was due.⁷

If a slump sum is stipulated, as the freight of an entire ship, or of a distinct portion of a ship, for the whole voyage, the full sum is due, though the merchant may not have laden goods to the full extent. If the freight is so much per ton, according to the tonnage of the vessel, the freighter must pay freight for the actual number of tons which the vessel is capable of containing, and not according to the number of tons mentioned in the registry. As where a vessel was described as being of the burden of 261 tons, or thereby, and the charter-party was for a full and complete cargo, at a rateable freight;—it was held, that the loading of goods, equal in number of tons to the tonnage described in the charter-party, was not a performance of this agreement, but, that the measure of a full and complete cargo is, such a number of tons as the ship can without injury carry;⁸ and if the agreement is to pay a certain rate of freight for each cask or bale, the merchant must, in the first place, pay according to the number of casks or bales actually shipped or delivered, although the whole number agreed on may not have been brought, the merchant having his action of damages.⁹

When the freighter is to pay a certain sum of freight by the month, week, or other portion of time the voyage

⁷ *Gibbon v. Mendez*, *ut sup.*

⁸ *Hunter v. Fry*, 28th April, 1819: 2 B. A. 421.

⁹ *Abbot*, 410. *Holt*, 430.

may occupy, the risk of the longness or shortness of the duration falls upon the merchant; and should no precise day be fixed for the voyage commencing, it will be held to commence on the day the vessel actually breaks ground, and sails on her intended voyage,—to continue during the whole course of the voyage,—and also during any unavoidable delays, not caused by the neglect or misconduct of the master or owners, or by such other causes as will suspend the contract of affreightment for a particular period.¹ It is no answer, therefore, to an action for freight for twelve months, to say, that the vessel was not made duly tight and strong, and had been compelled to stop at Portsmouth to repair, in consequence of which the master had been delayed in the receipt of his cargo;—because the court held, that the freighter had accepted the ship, in the condition in which she was, immediately after the charter-party, by putting his goods on board, and because the shipowner had performed the voyage, though imperfectly,—from which imperfect performance, if the merchant had received any injury, he had his action of damages.² So also, where a vessel, freighted on time, was captured, confiscated, and detained some weeks; but when liberated, she took in a new cargo, and arrived;—freight was held to be due for the whole time—as for a voyage never discontinued, and as if the detention had arisen from contrary winds or embargo.³ And where the freighter was to pay so much per month, for six months certain, and so in proportion for any longer time he might keep the ship; and she was to be kept in repair by the owner during the voyage; certain repairs were necessary, which occupied four weeks; but the freighter was held not entitled to deduct that time, in calculating the freight he had to pay.⁴ In a voyage on time, the month is a calendar, not a lunar month;⁵ and, unless in voyages on time, the risk of the duration of the voyage, in all other cases, lies upon the owners themselves.⁶

Although the general rule is, that freight is only

1 Abbot, 413.

2 Havelock v. Geddes; 10 East. 555.

3 Moorsom v. Greaves; 2 Camp. 627.

4 Ripley v. Scaife, 26th January, 1826; 5 B. C. 167.

5 Jolley v. Young; 1 Esp. 186.

6 Abbot, 413.

demandable after the voyage has been performed, and the goods delivered, yet there is nothing to prevent parties from making an agreement, that the freight is to be paid, unconditionally, beforehand, without regard to the completion of the voyage, or that an advance of money shall be paid beforehand to the owner, which may or may not be deducted from the freight, according to the vessel's arriving safe, or otherwise; provided, either this appears from express words, or the understanding of the parties is sufficiently intelligible. As, where the contract for the conveyance of the goods was verbal merely, but the broker who freighted the ship, told the shipper that the freight of goods from London to the Cape was £5 per ton, if paid in London, and £7 if paid in the Cape, and the shipper preferred the contract at £5 per ton;—soon after the vessel sailed, the broker called upon the shipper for payment, who promised to call and pay it on the following Monday; but the vessel was lost; and, in an action for payment of the freight,—it was held, that the meaning of the agreement was, that the money should be paid at all events, upon the delivery of the goods on board the ship at London; the Lord Chief Justice observing,—“there is no doubt that a man may “agree to pay money on the delivery of the goods on “board the ship, call it what you will.” In like manner, where a charter-party bore, that £120 were to be paid for the freight of the outward cargo, at Maranham, and as much cash as might be found necessary there, for the vessel's disbursements, to be advanced by the merchant or his agent, to the master, free from interest and commission, at the current exchange of the place, and *the residue of such freight* to be paid on delivery of the homeward cargo in Liverpool:—the vessel was lost by capture on the homeward voyage,—and it was found, that the merchant was not entitled to recover, under the charter-party, money advanced by him for the vessel's disbursements at Maranham.⁷ And, in another case, the freighter was to pay the owner, for the voyage, £1 per ton, per month, on the vessel's tonnage,—to pay four

⁷ Andrew v. Moorhouse, 1814; 5 Taunt. 435.

⁸ De Silvalle v. Kendall, 18th April, 1815; 4 M. S. 37.

months of such hire in advance,—and, at the end of six months, two farther months' pay, and so on in every succeeding two months, and the balance due at termination of such hiring, in cash, or approved bills; and, farther, if the vessel should be lost or captured, the freight, by time, should be payable up to the time she was lost or captured, or last heard of:—the vessel was lost before the expiration of the four months, for which payment had been made in advance; and in an action by the freighter, to have the money so advanced returned to him, his claim was rejected.⁹

But in a case in which the bills of lading bore,—some of them, “freight for the said goods being paid in London,”—and others, “the shippers paying freight for the said goods, in London,”—and these were the only evidence of the agreement; the vessel was lost on the voyage; and, in an action by the owner against the shippers, on an implied promise to pay him a certain sum of money on the shipment of the goods,—it was held, that the words quoted meant no more than that the freight should be paid in London, instead of Lisbon, and did not dispense with performance of the voyage; and that if the shipper had paid the freight upon the shipment of the goods, he might have recovered it back.¹ And where, by charter-party, one-half the freight was to be paid on right delivery of the cargo, the other by bill on London at four months, and the captain was to be supplied with cash for the ship's use, in pursuance of which he drew a bill which was accepted and paid; the vessel was lost on her homeward voyage; and it was decided that this bill was a loan to be reimbursed by the shipowners, and being no part of the freight, could not be recovered by the merchant from the underwriters, under an insurance upon the ship and all the goods on board.²

But, besides the instances already given, in which no freight will be due, there may be other cases, in which also, there will be no claim for any part of the freight.

⁹ *Saunders v. Drew*, 27th April, 1852; 3 B. Ad. 445.

¹ *Mashiter v. Buller*, 1807; 1 Camp. 84.

² *Manfield v. Maitland*, 23rd June, 1821; 4 B. A. 583.

For instance,—on a homeward voyage, the vessel received damage, put into a port to repair,—and part of the cargo was sold to defray the expenses; thereafter she was captured, recaptured, and sent into St. Kitts', where she was driven on shore and wrecked, but the remaining part of the cargo was saved, and sold under warrant of a magistrate, and the proceeds remitted to the shipowners, who claimed retention of it for the freight of that part of the voyage performed; but it was held, that the captain's conduct, in obtaining an order for selling the goods, and selling them accordingly,—which was an unnecessary act, and which disabled him from forwarding the goods,—was, in effect, declining to proceed to earn any freight, and, therefore, entitled the shipper to the entire proceeds of the goods, without any allowance for freight.³ In another case, the vessel sailed, with a cargo of coals for Lisbon, to a distant English port, to take convoy for the voyage, the freight being payable on the right delivery of the cargo; at that port, she was detained a considerable time by contrary winds; and, after having joined convoy, and received sailing instructions, these were recalled,—the ports of Portugal being shut against British ships, by the Portuguese government,—and the vessel returned to Spithead, where she remained for about two months, at the expiration of which time, the master formally required the freighters to land the cargo; but they would not interfere, and he subsequently landed them, and they were sold by consent of all parties, without prejudice to either party;—in an action by the master against the merchant for freight, for the proportion of the voyage performed, and for the detention of the ship, the court held, that he was not entitled to recover,—the parties having entered into a special contract, by which freight was made payable in one event only,—that of a right delivery of the cargo, according to the terms of the contract, and that event had not taken place.⁴ And, in another case, a vessel was on a voyage from Charleston to a port in Holland; but, having received information sailing up the Channel, of the British orders in council,

³ Hunter v. Prinsep, 25th November, 1806; 10 East. 378.

⁴ Liddard v. Lopez, 7th February, 1809; 10 East. 526.

—for the capture and condemnation of vessels trading to ports at war with Great Britain, or from which the British flag was excluded,—the master brought the ship to London, landed the cargo, and offered to deliver it to the shipper's agents, on payment of his freight and charges;—it was decided, that the master had no claim for freight, there having been no acceptance of the goods short of the port of destination, and no foundation for a promise to pay freight, *pro rata itineris*, (according to the proportion of the voyage.)⁵

You know that it is a common practice for the owners also to insure the freight to which they may become entitled, and before proceeding to the liability of parties, under the contract of affreightment, it may be as well to see, in what cases the value of the freight insured can be recovered from the underwriters.

Here, the general rule is, (contrary to what is the rule as to the payment of freight,) that the risk attaches, under the policy, from the time the goods to be carried are put on board; but the insured can only recover for the goods actually on board at the time of the loss, whether under an open or valued policy, unless there has been a regular contract or charter for the shipment of the whole; and if the goods are not actually on board, there must be the same contract for the shipment of goods which were ready to be put on board, and which the vessel was ready to receive, so that the owners would have earned freight, had they not been prevented by some of the perils insured against.⁶ A few examples will illustrate all the branches of this rule.

Let us first take a case where there was no charter-party, or contract of affreightment. A vessel went out with a cargo to Hayti, which was to be bartered for other goods, to be brought back to Liverpool in the same vessel; she arrived at Hayti, and part of the outward cargo was bartered for fifty-five bales of cotton, which were put on board, when the vessel was lost by the perils of the sea, with the remainder of the outward cargo on board; but this, though damaged, was afterwards saved and exchanged for other goods, the produce

⁵ *Osgood v. Groning*; 2 Camp. 466. ⁶ 1 Park, 55; 1 Arn. 202.

of the island ;—in an action against the underwriter on freight, for the loss of the freight of the homeward voyage, it was held, that the insured could only recover for the freight of the fifty-five bales of cotton on board.⁷ This case was an open policy ; but the same case came again before the court on a valued policy, and the same decision was given,—Lord Ellenborough remarking,—“ In this case, as there was no contract under which the shipowner could claim freight, but for the goods actually shipped on the homeward voyage, the assured could have made no claim had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton, which were shipped for this country, and of the premiums and commission thereon ;—the question then is,—whether it makes any essential difference that this is the case of a valued policy ; and we are of opinion, on full consideration, that it does not.”⁸

Where, however, either the goods were put on board, from the carriage of which freight would result, or there was some contract, under which the shipowner, unless for some of the perils insured against, would have been entitled to demand freight,—he will be entitled to receive the value of such freight under the policy. As, for instance,—a vessel was chartered on a voyage and back, at a certain freight upon the outward cargo ; and, after delivering her outward cargo, the charterers were to provide her a full cargo homeward, at the current freight, and this freight was insured ;—while the vessel was delivering her outward cargo, and before any part of the homeward cargo was on board, the vessel was captured ; as the contract of affreightment, under the charter-party, was entire,—it was held, that the policy on the homeward cargo had attached, and that the owners could recover from the underwriters.⁹ In another case, on an insurance on freight, at and from the port or place of loading, to the port or place of discharge, the vessel put into the former port, for the purpose of repairs, which were completed, and a full cargo purchased for the owner, and deposited in warehouses, seven miles distant,

⁷ *Forbes v. Cowie* ; 1 Camp. 320. ⁸ *Forbes v. Aspinall* ; 12 East, 323.

⁹ *Horncastle v. Stuart* ; 7 East, 460.

ready to be put on board; while in the act of being got out of dock, the vessel received so much injury, as to make her a total wreck, and an abandonment was necessary;—it was held, that the insured on freight was entitled to recover from the underwriters.¹ And, under an insurance on freight, the shipowner is entitled to recover from the underwriters, the value of the benefit he would have derived from carrying his own goods on the voyage insured, if there had been no loss.²

The contract for the carriage of the goods may, in a question with the underwriters, be proved either by a written agreement,³ or it may be made out from letters only,⁴ or by witnesses merely.⁵

Let us now see, who are the parties liable to pay freight; and, here, the general rule is, that the person who receives the goods, under a bill of lading, is liable to pay the freight of these goods, and that any one accepting delivery under a bill of lading, binding the consignor or consignee, or his assigns, to pay freight, becomes liable so to pay. It is another general rule, that, failing payment of the freight being made by the consignee, or person receiving the goods, the consignor, or person shipping the goods, remains liable for the freight; but, it may now be taken as settled, that a consignee, or a purchaser from him, taking the goods under a bill of lading, stipulating that the delivery is to be made to the consignee, or his assigns, he or they paying freight for the same, becomes liable for the freight.⁶

The only difficulties are, either, when the goods are received under bills of lading, which do not stipulate for payment of the freight, as a condition of receiving the goods; or, where the party receiving them, does not do so under, or in virtue of the bills of lading. Thus,—in regard to the former,—where goods were shipped on a bill of lading, to the charterers or their assignees, “he or they paying freight as per charter-party,” which had been entered into with the shippers, and the bill of lading was indorsed to the party who had received the

¹ *De Vaux v. J'Ansen*, 8th May, 1839; 5 Bing. N. C. 519.

² *Flint v. Fleming*, 23rd June, 1830; 1 B. Ad. 45.

³ *Truscott v. Christie*, 14th Nov., 1820; 2 B. B. 321.

⁴ *Park v. Hebson*; 2 B. B. 326. ⁵ *Flint, ut sup.* ⁶ *Abbot*, 421. 2.

goods, and these were delivered and entered in his name, without any demand of freight;—it was held, that the contract for payment of freight rested on the charter-party for the voyage and time stipulated,—and that there was no implied agreement to pay freight, as against the indorsee of the bill of lading.⁷ And—in regard to the latter—where the goods are received, not under the bill of lading, it was held, that, where the goods were received by an individual, acting only as agent for the shipper, and under instructions to do the best for them, that individual was not liable for the freight;⁸ and where the goods have been delivered under the orders of the consignees, who were also charterers of the vessel, the person so receiving delivery was not liable for the freight, upon the ground of an implied promise to pay freight, unless it can appear, from the previous dealings and usage between the parties, that they had been in the habit of receiving goods in the same manner, and paying freight for them.⁹ But, if the delivery is made under or in virtue of the bill of lading, though it be merely to a warehouse-keeper, as agent for the shipper, he will be liable for the freight;¹ and the same holds, though the person receiving the goods should be the indorsee of the bill of lading, which conditions for the person named, or his assigns, paying freight.²

But, although the goods may have been delivered without payment of the freight, or although the consignee, or person receiving the goods, may not be able to pay freight, the consignor, or shipper is, in the general case, still answerable for the freight. As, where the master took a bill from the consignee drawn upon the shipper, for a balance of the freight, and the shipper refused to accept of it, he was, however, found liable for that balance of the freight, upon the charter-party which had been originally entered into with him.³ Where also, the goods had been delivered, but the mas-

7 *Moorsom v. Kymer*, 28th February, 1814; 2 M. S. 308.

8 *Ward v. Felton*, 9th June, 1801; 1 East. 507.

9 *Wilson v. Kymer*, 8th February, 1813; 1 M. S. 157.

1 *Bell v. Kymer*, 1814; 5 Taunt. 477.

2 *Cock v. Taylor*, 1811-13; East. 399.

3 *Tapley v. Martens*; 8 T. R. 451.

ter could not get payment of the freight from the consignee, the consignor was held liable for it;⁴ and this obligation upon the shipper or consignor will not be discharged, under a charter-party, by the master delivering the goods to the consignee, without demanding payment of the freight,⁵ nor by the master taking a bill for the freight, which is afterwards dishonoured,⁶ unless he take that bill voluntarily, and for his own convenience, without insisting upon payment in cash.⁷ Where the shipper is also the owner of the goods, his liability for the freight will still continue, though the master may have delivered them, without demanding freight, and that whether the goods have been shipped under a charter-party, or on a bill of lading for the shipper's account and risk,—the clause in the bill of lading being introduced merely for the benefit of the master and shipowner, and the owner of the goods will not be discharged of his liability, by the neglect to obtain payment from the consignee.⁸

Payment of the freight is generally fixed by the terms of the charter-party, where there is one; and where there has been no express bargain as to this payment, or the mode of making the payment, the master is entitled to detain the goods in his possession, until his freight be paid; and he may land the goods at a wharf, and detain them there; or where the goods have to be landed in the King's warehouse, or in dock warehouses, under the revenue statutes, for payment of the duties, the master can enter them in his own name, by which he does not lose possession, nor is his lien discharged;⁹ and this right of lien extends over every part of the cargo, for the freight of the whole, where the whole belongs to the same individual.¹ The master cannot, however, detain the goods on board, until actual payment, but must allow the merchant an opportunity of examining their condition;² and, where there are sub-

⁴ *Christie v. Row*, 1808; 1 Taunt. 300.

⁵ *Shepherd v. De Bernales*, 1811; 18 East. 565.

⁶ *Marsh v. Pedder*, 9th July, 1815; 4 Camp. 257.

⁷ *Strong v. Hart*, 1826; 6 B. C. 160.

⁸ *Domett v. Beckford*, 7th November, 1833; 5 B. Ad. 521.

⁹ *Abbot*, 300, 414; 6 Geo. 4, c. 112, § 45.

¹ *Soldergreen v. Flight*; quoted 6 East. 623. ² *Abbot*, 377.

freighters, the master can only claim from each, the freight agreed to be paid by each to the original freighters.³ The bankruptcy of the charterer, or his assignment or pledge of the goods, does not defeat this lien;⁴ and the goods of the sub-freighters are liable to a lien, to the extent of the sums of freight due by each for his goods;⁵ but the master is not bound, at his peril, to exercise this right of lien, or to insist on receiving payment of the freight before delivery of the goods; and, if the goods are delivered, and the freight not paid by the consignee, the merchant-charterer may be afterwards sued for it upon the charter-party.⁶ There is no lien for demurrage, or pilotage, or port charges, or for dead freight, or a sum of damages in consequence of not loading a full cargo;⁷ but the goods of the charterer may be detained, not only for the actual freight of these goods, but for a sum agreed to be paid for the use and hire of the ship.⁸

It will be unnecessary to trouble you with the few special cases, in which, from the very peculiar terms of the charter-party, this right of lien was held to have been excluded; because, the exercise of this right is generally superseded by the special mode or manner in which it has been agreed the freight should be paid, the same as in the case of other liens, which may be excluded by the special custom of trade, or by the special agreement for payment at a future period. As, for instance, where the freight is to be paid for by approved bills, at a certain date, in which event, the delivery of the cargo, and the granting of the bills, must take place at the same time,—or, rather, the bills should be placed in the hands of some confidential third party, to await the delivery,⁹ unless it appear from the charter-party or bills of lading, that the bills for the freight were to be granted before the delivery of the cargo;¹ and, when payment is to be made by bills, delivery of the goods cannot be required, without, at the same

³ *Mitchenson v. Begbie*; ⁹ *Bing*, 190. ⁴ *Abbot*, 299.

⁵ *Faith v. East India Co.*, 29th June, 1821; ⁴ *B. A.* 630.

⁶ *Christie, ut sup.* ⁷ *Abbot*, 286. ⁸ *Faith, ut sup.*

⁹ *Yates v. Railston*; ⁸ *Taunt.* 293. *Yates v. Magnall*, *ib.* 302.

¹ *Campion v. Colvin*; ³ *Bing*. *N. C.* 17.

time, tendering the bills.² But if a bill has been taken and negotiated, this will be held to be a discharge of the right of detention, and an implied consent to the merchants having the goods.³ If, however, bills have been taken, and these are dishonoured, should any part of the cargo remain in the master's hands undelivered, he is entitled to exercise his right of lien over it.⁴

Although the merchant can insist upon an inspection of the goods, before taking delivery of them, yet, if these goods are damaged, and the merchant take delivery of them, without judicial authority, and without informing the master that he will not pay the freight, he will be liable for it, and will not be entitled to plead the damage sustained by the cargo, against a demand for the freight.⁵ The remedy of the shipper, for the damages done to the cargo, if these damages have occurred through the fault or misconduct of the master, or where they arise from a breach of the charter-party, must be by a separate action against the owners.

But the cargo may be so much damaged, as not to be worth the freight: can the merchant, in that case, abandon the cargo for the freight? This is a difficult question to answer, and no case of the kind has occurred for decision in this country. It has been said, by high authority, that,—“As to the value of the goods, it is “nothing to the master whether the goods are spoiled or “not, provided the merchant takes them; it is enough “if the master has carried them, for, by doing so, he has “earned his freight, and the merchant shall be obliged “to take all that are saved, or none;—he shall not take “some and abandon the rest, and so pick and choose “what he likes,—taking that which is not damaged, and “leaving that which is spoiled or damaged. If he abandons, he is excused freight; and he may abandon all, “though they are not all lost.”⁶ But the question of abandonment did not arise in that case,—and, as I have now said, no case has been decided in which the question of abandonment for freight has arisen, when the goods arrived at their port of destination. The true distinction

² *Tate v. Meek*, 1818; 7 Taunt. 280.

³ *Horncastle v. Farren*, 24th April, 1820; 3 B. A. 497. ⁴ *Abbot*, 299.

⁵ *Abbot*, 427. ⁶ Lord Mansfield, in *Luke v. Lyde*, *ut sup.*

would seem to be, that, where the goods have been damaged by the perils of the sea, or by their own natural decay, or by a principle of corruption inherent in themselves, without any negligence or blame imputable to the master or mariners, the merchant must take the goods, and cannot, by abandoning them, relieve himself from payment of the freight. But where there has been a natural possibility for the master to have prevented the damage, the merchant may abandon,⁷ although this right never appears to have been claimed in this country.⁸

Where there has been an agreement with the merchant, to load a certain quantity of goods, and he either does not load the goods at all, or does not load the full quantity contracted for, a claim of damages thence arises, called dead freight.⁹ But this claim is not freight at all, and is only indemnification for the loss of the freight; and, where there is a charter-party, the penalty in it may be taken as the measure of the damages; or the owner may sue for damages generally, and, then, the actual loss sustained by the want of the cargo, will be the extent of the damage.¹ There is no lien upon the goods shipped, for this dead freight.²

It is always a stipulation in the bills of lading, that the party paying the freight, also pays "primage and average accustomed." The word "primage" is better known by the name of the master's hat-money, and means a small payment to the master, for his care and trouble, which he receives to his own use, unless he has otherwise agreed with his owners, and for which he can maintain action, although the freight has been separately adjusted, unless, by the agreement between the owner and the shipper, this claim has been excluded. The word "average," here used, refers to several petty charges, such as towing, beaconage, &c., which are to be borne, partly by the ship, and partly by the cargo. These two payments are regulated by the usage in different trades and voyages, and are often exchanged for a fixed sum, or a certain per centage on the freight.³

I am, &c,

7 Holt, 433. 8 Abbot, 427. 9 Phillips v. Rodie, 1812; 15 East 547.

1 Harrison v. Wright; 13 East. 343.

2 Birley v. Gladstone, 16th November 1814; 3 M. S. 205.

3 Abbot, 404. Holt, 420.

LETTER XIX.

On arrival at a foreign port, master must lodge agreement, &c., with British consul, &c.—cannot discharge any of crew at British colony or plantation without previous sanction of British consul, &c., nor leave behind, without similar certificate—proof of having obtained such, lies upon master—when allowed to be left behind, must deliver account of wages, and pay in money or by bill—what is absolute desertion—instances of what is not desertion—seaman deserting forfeits wages, clothes, &c.—must be entered in log-book—what is held desertion under the statute—correct inventories must be made—higher wages paid substitute, excess can be recovered from deserter—cannot be prevented from entering navy—rights of seamen so entering—master receives certificate from officer—when entering navy, no cover for desertion—forcing on shore, and leaving behind any of crew—punishments for—courts competent—power of—mutiny—powers of master in case of—no power to punish as a criminal—may be liable in damages—assault, &c., on board a British ship in any part of the world—punishment of—disposal of fines or forfeitures—apprentices—complaints by or against—offences against property or person, in any port, &c., of her Majesty's dominions—how complaint disposed of by consul—conveyance home of offender and witnesses—trial of, and for misdemeanors—evidence on—disposal of register ticket—persons discharged or wilfully and wrongfully left behind, &c.—recovery of money disbursed for—recovery and application of penalties—within what time complaints must be brought—fines, imposed under Mercantile Marine Act, to whom paid—entry of offender into naval service—or discharge abroad—of entry of offences in log-book—conduct and character of seamen in official log-book—entry of illness, &c., in official log-book—and of seamen ceasing to be members of crew.

GENTLEMEN,

Having thus safely delivered your cargo—taken an average bond, where that is required—and settled the average contribution in a legal manner,—and having settled and received payment of the freight, your next duty will be in regard to your seamen.

You must recollect, that it is your duty, under the Merchant Seamen's Act, on your arrival at any foreign port (unless in the case of packets for passengers in the

course of their voyage), where there is a British consul or vice-consul, or at any port in a British colony, and remaining thereat forty-eight hours, within forty-eight hours after the ship's arrival, to deliver or cause to be delivered, to the consul or vice-consul at such foreign port, and to the collector and controller of the customs, at the port of a British colony, the agreement or agreements of the ship's crew, having an account, at the foot of the agreement, of all the apprentices on board, containing their christian names and surnames at full length, —the dates of registering their indentures and assignments,—and the ports at which, and the time when they were registered, with the indentures and assignments themselves,—the whole to be by the consul or vice-consul, or collector and controller, kept during the ship's stay there, and to be returned to you, a reasonable time before you leave the port, without any fee or charge being made for the same, (except the register tickets of deserters, which are to be transmitted by them to the registrar,) and with it a certificate indorsed on the agreement, stating when the same were respectively returned; and that if you refuse or neglect to deliver the agreement, &c., and the account as is required by the act, you forfeit and pay £30.¹ Should it appear that the required forms or existing laws have been, in any respect, neglected or transgressed, the consul or vice-consul, collector or controller, must make an indorsement to that effect, and forthwith transmit a copy of it, with the fullest information he can collect regarding the neglect or transgression, to the registrar.²

You cannot, without being guilty of a misdemeanor, discharge any individual person of your crew, at any of the British colonies or plantations, without the previous sanction in writing, indorsed on the agreement, of the governor, or other officer holding the chief authority there, or the secretary or other officer appointed in that behalf by the government there, or in absence of these authorities, of the chief officer of the customs resident at or near that port or place; and you cannot discharge any such person of the crew at any other place abroad,

¹ 7 and 8 V., c. 112, § 58. ² *Ibid.*

without the like previous sanction indorsed on the agreement, of her Majesty's minister, consul or vice-consul there, or in their absence, then, of two respectable merchants resident there. These functionaries or merchants are authorised and required to examine into the grounds of the proposed discharge, in a summary form, upon oath, and to grant or refuse their sanction or certificate, according to the circumstances, and as may appear just.³ But the Board of Trade can, by regulations duly published, dispense with the necessity of obtaining these sanctions for the discharge of seamen, in her Majesty's dominions abroad, and can limit such dispensations to any particular class of ships or voyages, and impose any conditions it may think fit, and revoke such dispensation; and, while such dispensation is in force, the master, whose agreement permits of his so doing, can discharge his crew, or any members thereof, without the requisite sanction, in any place to which the dispensation applies.⁴

By the Merchant Seamen's Act, it is also enacted, that, if the master discharge any person belonging to his ship or crew, at any of her Majesty's colonies or plantations, without the previous sanction in writing, indorsed on the agreement, of the governor, or other officer holding the chief authority there, or of the secretary or other officer duly appointed by the government there, in that behalf, or in the absence of these functionaries, of the chief officer of the customs resident at or near that port or place; or if he discharge any such person at any other place abroad, without the like previous sanction, indorsed on the agreement, by her Majesty's minister, consul, or vice-consul there, or in the absence of any of these functionaries, then of two resident merchants there, the master is guilty of a misdemeanor. But the Board of Trade can dispense with this sanction also. So also, if the master abandon or leave behind, at any of the colonies or plantations, any person belonging to his ship or crew, on the plea or pretence of unfitness or inability to proceed on the voyage, or of desertion or disappearance from the ship, without a previous certificate in writing, indorsed on the

3 § 46. 4 13 and 14 V., c. 93, § 76.

agreement, of the governor or other officer holding the chief authority there, or of the secretary or other officer duly appointed by the government there, in that behalf, or, in their absence, of the chief officer of customs resident at or near that port or place, certifying the unfitness, inability, desertion, or disappearance; or if the master abandon, or leave behind, any such person at any other place abroad, on shore, or at sea, upon any such plea or pretence, without the like previous certificate of her Majesty's minister, consul, or vice-consul there, or in the absence of any of these functionaries, then, of two respectable merchants, if there be any at or within a reasonable distance from the place where the ship may then be, the master is in like manner guilty of a misdemeanor. These functionaries are authorised and required, and the merchants are authorised, to examine into the grounds of the proposed discharge, and into the plea or pretence of unfitness, inability, desertion, or disappearance, in a summary way on oath, which they are authorised to administer, and to grant or refuse their sanction or certificate, according to the circumstances, and as may appear to them to be just. And, in case any person belonging to the ship or crew, desert from the ship at any place abroad, should the master neglect to notify the same in writing to one of the before-mentioned functionaries, if there be any such resident at or near the place; and, in their absence, if it be out of her Majesty's dominions, then, to two respectable merchants, if there be such at or near the place, within twenty-four hours of the desertion,—the master is guilty of a misdemeanor.⁵

It may be proper here to notice, what acts of a seaman have been held to amount to an absolute desertion, so as to incur a forfeiture of wages. Thus, where a mariner was permitted by the master to go ashore, but neglected or refused to return to the vessel, when demanded by the master;—this was held to amount to a desertion which forfeited his wages.⁶ Where, also, a mariner having quitted his ship, by order of the mate, at Jamaica, applied to the master, who was on shore, for his dis-

⁵ § 46. ⁶ *Bulmer, Brown*, 26th July, 1823; 1 Hag. 163.

charge, which the master refused, and ordered him to return to his duty, but the mariner engaged in another vessel;—this conduct was held as a desertion, working a forfeiture of wages.⁷ And, where a mariner quitted the vessel in defiance of the master, with opprobrious language, and,—without any declaration of such intention when he quitted the vessel,—entered into a King's ship within twenty-four hours;—this was held a desertion, working a forfeiture of wages.⁸ But where the seamen obtained leave to go on shore at Dominica, on condition of returning at "gunfire" or "sunset" in the evening, and got drunk, and were drunk all next day and night, and were taken before a magistrate, charged with desertion, and imprisoned seventy-five days in the island;—the men had left their clothes and property on board, and were willing to return to their duties;—this was held not to be a desertion, forfeiting their wages.⁹ And, where a master refused to certify for the wages of his crew, on their quitting the ship,—he having previously used equivocal expressions as to their dismissal,—this was held no decisive proof of desertion.¹ So also, seamen being on shore on duty, and, on being required to return to the ship, requested permission to stay and get some victuals, saying they had had no victuals the whole day,—and, on being refused, they remained on shore, and went to the ship next morning, when the master dismissed them, and refused to pay them their wages;—this was held no desertion.²

By the Mercantile Marine Act, it is enacted, that, in all cases of desertion from the ship, in any place abroad, the master must produce the entry of such desertion in the official log-book, to the person or persons required by the Merchant Seamen's Act, (sections 46 and 49, as narrated in this letter,) to indorse on the agreement a certificate of that desertion; and, if such person is a public functionary, he must,—and, in other cases, the master must,—forthwith transmit these copies to the

7 *Jupiter, Croebie*, 29th January, 1829; 2 Hag. 231.

8 *Amphitrite, Morgan*, 2nd May, 1832; 2 Hag. 403.

9 *Ealing Grove, Falconer*, 13th June, 1826; 2 Hag. 15.

1 *Frederick, Hearn*, 1st December, 1823; 1 Hag. 211.

2 *Sigard v. Roberts*; 3 Esp. 71.

registrar of seamen in England. If required, the registrar causes these copies to be produced in any legal proceeding; and, if purporting to be so made and certified as aforesaid, and if shown to have come from the custody of the registrar, such copies must, in any legal proceeding relating to that desertion, be received as evidence of the entries therein appearing.³

The statute enacts, that every seaman, or other person, who deserts the ship to which he belongs, forfeits to the master or owner thereof, all the clothes and effects which he may leave on board, and also all wages and emoluments to which he might otherwise be entitled; and, in case of desertion abroad, the seaman forfeits all wages and emoluments which may be or become due, or be agreed to be paid him, from or by the owner or master of any other ship, in whose service he may have engaged, for the voyage back to the United Kingdom. All wages and portions of wages and emoluments, which may be forfeited for desertion, are to be applied, in the first instance, in and towards reimbursement of the expenses occasioned by that desertion, to the owner or master of the ship, and can be recovered by the master, or by the owner or his agent, in the same manner as seamen recover their wages, (13 and 14 Vic., c. 93, § 73); and, in case of desertion in the United Kingdom, the master must deliver up the register ticket of the deserter to the collector or controller of the port. But every desertion must be entered in the log-book at the time, and certified by the signatures of the master and mate, or the master and one other credible witness. And the absence of a seaman from his ship, at any time within the space of twenty-four hours immediately preceding the sailing of the *ship from any port*, whether before the commencement or during the progress of the voyage, wilfully and knowingly; or the wilful absence from his ship, *at or for any time*, without permission, and under circumstances showing that it was his intention to abandon the same, and not to return, is to be deemed a desertion.⁴ It is necessary, however, that you make a correct account of all wages and emoluments, to which the seaman may

3 § 74.

4 7th and 8th V., c. 112, § 9.

be entitled, at the time of desertion, and that you take correct inventories of his clothes and effects left on board, which ought to be certified by the mate or other credible witness; as, should inventories not be taken, and should there be any after dispute with the person so deserting, the value of his clothes and effects, so left, will be allowed to be ascertained by his oath.⁵

When a master leaves a seaman, or other person belonging to his ship or crew, on shore, at any colony, plantation, or place abroad, under a certificate of his not being in a condition to proceed on the voyage, he must deliver to one of the functionaries already mentioned, or, if there be none such, to any two respectable merchants there, or, if there be but one, then to that one merchant, a just and true account of the wages due to the person, and pay the same, either in money, or by a bill drawn on the owner, and, if by bill, the functionaries or merchants are authorised or required, by indorsement on the bill, to notify, that it is drawn for money due on account of seamen's wages, or to that effect. Should the master refuse or neglect to deliver a just and true account of the wages, or pay the amount in money or by bill,—for every such offence or default, he forfeits and pays £10; and, should he deliver a false account of the wages, he, for every such offence, forfeits and pays £20.⁶

If the desertion take place in parts beyond seas, and you are under the necessity of engaging any seaman, as a substitute for the deserter, at a higher rate of wages than was stipulated in the agreement, to be paid to the seaman deserting,—your owner or yourself are entitled to recover from the deserter, by the same summary proceeding as wages are recoverable, any excess of wages which may have been payable to the substitute beyond the amount which may have been payable to the deserter, had he duly performed his service, pursuant to his agreement; although no seaman can be imprisoned longer than three calendar months, for non-payment of this excess of wages.⁷ But, during the vessel's stay at a foreign port, no

5 *Gowans v. Thompson*, 6th February, 1844; 6 D. B. M. 606.

6 7 and 8 V., c. 112, § 49.

7 § 9.

seaman can be shipped, except with the sanction of the British consul or vice-consul there, to be indorsed or certified on the agreement, under the penalty of your forfeiting £20, for every seaman shipped in breach of the act.¹

Nothing in the Merchant Seamen's Act, nor in any mariner's agreement, can be extended to prevent any seaman or person belonging to any merchant ship whatever, from entering or being received into the naval service of her Majesty; nor is such entry to be deemed a desertion from the merchant ship, nor does it incur any penalty or forfeiture whatever, either of wages, clothes, or effects, or other matter or thing; and all masters and owners are strictly prohibited from inserting or introducing into the ship's articles, or the agreement with the crew, any clause, engagement, or stipulation, by which any forfeiture is agreed to be incurred by a seaman, or by which he is exposed to loss, upon his entry into her Majesty's service; and if any such clause, engagement, or stipulation be inserted, it is void, and the party offending thereby incurs a penalty of £20.² When any seaman quits a merchant ship, in order to enter into the naval service, and is thereupon actually received into that service,—not having previously committed any act amounting to, and treated by the master as, a desertion, he is entitled, immediately upon such entry, to have his register ticket, and all his clothes and effects, on board the merchant ship, and to receive from the master the proportionate amount of his wages, up to the period of such entry, to be paid either in money, or by a bill on the owner; all which register ticket, clothes, effects, money, or bill, the master must deliver and pay accordingly, under a penalty of £20, for any refusal or neglect, to be recovered by the seaman, with full costs of suit. But, in case the master has no means of ascertaining the balance of wages then due, he must make out and deliver to the seaman so entering, a certificate of the period of his services, and the rate of wages he is entitled to, producing, at the same time, to the commanding or other officer of her Majesty's ship, the agreement entered into with the seaman. On deli-

very of the register ticket, clothes, and effects, and the settlement of the wages, as now mentioned, the master is entitled to receive from the officer in command of the ship into which the seaman has entered, a certificate of the entry, indorsed on the agreement, and signed by the officer, which he must give.¹

You have already seen a case, where the mariner quitted the vessel in defiance of the master, with opprobrious language, and,—*without any declaration of such intention, when he so quitted her*,—entered into a King's ship within twenty-four hours;—this was held a desertion, working a forfeiture of wages.² So that it is not on every entry into her Majesty's naval service, that a seaman of a merchant ship will be entitled to his wages; he must have *quitted the ship in order to enter* the naval service, and he must not previously have committed any act amounting to, and treated by the master as, a desertion.

By the same statute, it is also enacted, that if the master of any ship belonging to any of her Majesty's subjects, or the mate or other officer of such ship, force on shore and leave behind, or otherwise wilfully and wrongfully leave behind, on shore or at sea, in or out of her Majesty's dominions, any person belonging to his ship or crew, before the completion of the voyage or voyages, for which that person had been engaged, or the return of the ship to the United Kingdom,—the master, mate, or other officer is guilty of misdemeanor. Every misdemeanor mentioned or created by the act, may be prosecuted by information, at the suit of her Majesty's Attorney-General, or by indictment, or other legal proceeding, in any court having criminal jurisdiction in her Majesty's dominions, at home or abroad; and the offence may be laid and charged to have been committed, in the county or place where the offender may happen to be, who, on being convicted, is liable to fine and imprisonment, or both, as to the court may seem meet; and such court can issue a commission or commissions for the examination of witnesses who may be absent, or out of its jurisdiction; and if these witnesses

1 § 51. 2 *Amphitrite*, Morgan, 2d May, 1832; 2 Hag. 403.

are absent at the trial, the evidence so taken is to be received in evidence.³ In any such prosecution for discharging, abandoning, or leaving behind any seaman, or other person belonging to the ship or crew, with or without his consent, it is incumbent on the master to produce or prove the previous sanction or certificate required by the act, or to prove the impracticability of obtaining the certificate.⁴

Although it is allowable to you, as master, in the case of mutiny—actual or open,—to resort to every necessary means of self-defence and resistance, for the purpose of repressing the mutiny and subduing the crew, and any thing which may then happen, is considered as done in self-defence; and although the law authorises you to restrain, by force, the commission of great crimes, and to confine or put in irons, mutinous seamen, either for the purpose of preventing the effects of the mutiny, or in order to bring them to trial in England,—yet, the law gives you no judicial authority to punish a seaman as a *criminal*, or to imprison him at a foreign port as a *criminal*. Should you do so, or should you excessively beat a seaman, or use him cruelly or oppressively, while abroad, you are liable, on the return to this country, to an action by the seaman for such conduct; and, in that action, you must be able to show, not only that there was a sufficient cause for chastisement, but that the chastisement itself was reasonable and moderate.⁵

The Merchant Seamen's Act provides, that, in case of any assault or battery, committed on board a British ship, in any part of the world, it is lawful for any two justices of the peace,—in any part of her Majesty's dominions, or the territories under the government of the East India Company, residing at or near any port or place, at which the ship may arrive or touch, on complaint of the party aggrieved,—to hear and determine that complaint, and to proceed and make an adjudication or judgment thereon, the same as any two justices are empowered by law to do, in cases of assaults and batteries in England; but the complaint must be made and prosecuted within three months after the ship arrives at

3 7 and 8 V., c. 112, § 47: 4 § 48. 5 Abbot, 180. Holt, 261.

her final port of discharge in the United Kingdom, or within three months after the parties are within the jurisdiction of the justices.⁶ The fine or forfeiture that may be imposed, is to be paid to the Seamen's Hospital Society. Any justice of peace, residing at or near to any place at which a ship, having an apprentice on board, may arrive, has also full power and authority to inquire into, examine, hear, and determine, all claims of apprentices upon their masters under their indentures, and all claims of hard or ill usage, exercised by the masters towards them, or misbehaviour on the part of the apprentices, and to proceed thereupon, as justices are empowered by law to do in other cases between masters and servants; and should the master not send on shore, in charge of the mate, or other trustworthy person, any apprentice desirous of complaining, to a justice, as soon as the service of the ship will permit, he, for every default, forfeits and pays £10.⁷ In connection with the foregoing enactment of the Merchant Seamen's Act, you may take the new provisions, in the Mercantile Marine Act, for naval courts, during the course of the voyage, which I have already detailed to you in a previous letter, and which I need not repeat here.

The Merchant Seamen's Act also declares all offences against the property or person of any subject of her Majesty, or of any foreigner, committed in or at any port or place, ashore or afloat, out of her Majesty's dominions, by the master and crew, including apprentices, or any or either of them, belonging to a ship subject to the provisions of the act, or who may have been master, or formed part of the crew, within three months before the committal of the offence,—to be offences of the same nature, and liable to the same punishments, as if they had been committed on the high seas, and other places within the jurisdiction of the Admiralty of England, and are to be inquired of, heard and determined in the same manner as if committed within that jurisdiction.⁸ Whenever any complaint is made to any of her Majesty's consuls or vice-consuls, of any such offence, or of any such offence having been committed at sea, by the master and

6 7 and 8 V., c. 112, § 44.

7 § 43.

8 § 58.

crew, including apprentices, or any or either of them, the consul or vice-consul can inquire into the case, upon oath, and, at his discretion, can cause any offender to be placed under all necessary restraint, so far as in his power, in order that he may be sent and conveyed in safe custody to England, as soon as practicable, in any vessel of her Majesty, or of any of her subjects, to be proceeded against according to law.⁹ The consul or vice-consul can order a passage to England for the offender or offenders, under necessary restraint, and also for the witnesses; and the master or person having charge of any vessel belonging to any subject of her Majesty, bound for England, must receive and afford a passage and subsistence during the voyage, to the offender or offenders, and witnesses, not exceeding one offender, or two witnesses, for every 100 tons of his ship's burthen; and, on the ship's arrival in England, the master must take, or cause to be taken, the offender or offenders before a justice of the peace, who deals with the matter as in cases of offences committed on the high seas. In case the master, or other person having charge of a vessel, when required by the consul or vice-consul, to receive and afford a passage to any offender or witness, do not receive and afford such passage, or do not take, or cause to be taken, the offender or offenders before a justice of the peace, he is liable to a penalty of £50.¹

When a trial for the offences first before mentioned, or for any misdemeanor against the act, takes place before any justices, or judges, for the trial of treason, felonies, or misdemeanors, or of prisoners indicted for offences, or committed for crimes,—the court can order and direct payment of the costs and expenses of the prosecution, the same as in the case of offences committed within the jurisdiction of the Admiralty of England.² The costs and charges of imprisoning the offender, and of conveying him and the witnesses to England, if not conveyed in the ship to which they respectively belong, are to be considered and deemed as part of the costs of prosecution, or be paid as costs incurred on account of sea-

9 § 59.

1 § 60.

2 § 58.

faring subjects of the United Kingdom, left in distress in foreign parts.³ All depositions taken before a consul or vice-consul abroad, and certified under his official seal to be the depositions, and that they were taken in presence of the party accused, are to be admitted in evidence in all courts having criminal jurisdiction, and otherwise, in like manner as depositions taken before any justice of peace in England now are or may be,⁴ if the witness himself cannot be found or produced, at the trial or hearing.⁵

The register ticket of every offender must be delivered up to her Majesty's consul or vice-consul, and transmitted by him to the registrar of seamen;⁶ but the seamen, if acquitted, can receive his register ticket again, upon due application to the registrar.⁷ Whenever a seaman is committed to prison, or a house of correction, the justice causes his register ticket to be delivered to the governor or keeper, who retains the same during the period of the imprisonment, and, at its expiration, returns the ticket to the seaman; and whenever a seaman may be sentenced to death or transportation, the officer having the custody of the seaman must transmit his register ticket to the registrar of seamen.⁸

The act also provides, that, should any person be discharged, or wilfully and wrongfully left behind, or abandoned, at any place beyond seas, or out of her Majesty's dominions, by any master, mate, or other officer, contrary to the provisions of the act, and should become distressed, and be relieved under the act for amending the laws relating to the pay of the royal navy, or any act to be hereafter passed for that purpose; or should any person, as principal or agent, engage any subject of her Majesty, to serve in any vessel belonging to any foreign power, or the subject of any foreign state, and should the person so engaged become distressed and be relieved in manner now mentioned, then, in addition to the wages due from that master, or owner, or person making such engagement, and the penalties to which the master may be liable, her Majesty is

3 § 59.

4 § 59.

5 13 and 14 V., c. 93, § 15.

6 § 59.

7 § 60.

8 § 7.

entitled to sue the master or owner of the ship, or the person who may have made the engagement, as already mentioned, at the discretion of the commissioners for executing the office of Lord High Admiral of the United Kingdom, for all the charges and expenses which have been incurred in or for the subsistence, necessary clothing, and conveyance home, or burial (should he die abroad, or before reaching home), of any such seaman, or person relieved, as money paid to the use of the master or owner, or other person who may have made such engagement, and recover the same, with full costs of suit, in the same manner as other debts due to her Majesty are recoverable. In any such proceedings, proof of the account furnished to the commissioners by any of the functionaries, or by two merchants, or one merchant, already mentioned, as provided by the statute above referred to, is, with proof of payment by the commissioners or paymaster-general, of the charges incurred on account of such person, to be sufficient evidence that such person was relieved, and conveyed home, and buried, at her Majesty's expense.⁹

It may be proper here to notice the mode of recovering, and application of, penalties imposed by the act; and for which no mode of recovery and application is specially provided. All these penalties and forfeitures can be recovered, with costs, either in any of her Majesty's courts of record, at Westminster, Edinburgh, or Dublin, or in the colonies or territories under the government of the East India Company, at the suit of her Majesty's law officers respectively; or at the suit of any person, by information and summary proceeding, before any justice or justices of the peace, in and for any part of her Majesty's dominions, or the territories under the government of the East India Company, at or near to the place where the offence may be committed, or the offender may be. If proceedings be commenced in any of her Majesty's courts, the court in which these proceedings may be instituted, can issue a commission or commissions in or out of her Majesty's dominions, for the examination of the witnesses, and the depositions of the witnesses

so taken are to be used and admitted in evidence; and, in the case of a summary conviction under the act, should the penalty imposed by the justice or justices not be paid, either immediately after conviction, or within the period appointed at the time of conviction,—the convicting justice or justices can commit the offender to the common goal, or house of correction, there to be imprisoned only, or imprisoned and kept at hard labour, for any time not exceeding six calendar months.¹

All these penalties and forfeitures are, when recovered, to be paid as follows, viz.:—as much thereof as the court, or convicting justice or justices, may determine, not exceeding one-half, is to be paid to the informer or person upon whose discovery and information the penalty may be recovered, and the residue is to be paid to the Merchant Seamen's Hospital Society; but the court, or the justice or justices, may mitigate or reduce the penalty, as to the court or justices may appear just and reasonable, the reduction being not to less than one-third its original amount. And the court, or justice or justices, hearing the complaint, may order such costs against the informing or complaining party, failing to prove the charge, as the court or justices may deem fit,—these costs being recoverable in the same manner as penalties under this act, and being to be paid as the justices may direct.²

But all proceedings, so to be instituted, must be commenced within two years after the commission of the offence, if committed at or beyond the Cape of Good Hope, or Cape Horn, or within one year, if committed elsewhere, or within two calendar months after the return of the offender, and the complaining party, to the United Kingdom.³

In addition to the foregoing enactments, it is enacted, by the Mercantile Marine Act, that, whenever an act of misconduct is committed, which is, by the agreement, subject to a fine, the appropriate fine must—if an entry of the offence is made and attested in the official log-book, as directed by the act, and if the offence is proved to the satisfaction of the shipping master to whom the

the fine is to be paid,—be deducted from the wages of the offender; and the master or owner must pay over every fine so deducted as follows, viz. :—in the case of foreign-going ships, to the shipping master before whom the crew is discharged,—and, in the case of home-trade ships, to the shipping master at or nearest to the place at which the crew is discharged; and if the master or owner neglect or refuse to pay over such fine, he, for each offence, is liable to a penalty not exceeding six times the amount of the fine retained. But if, before the final discharge of the crew in the United Kingdom, the offender enters into any of her Majesty's ships, or is discharged abroad, the offence must, then, be proved to the satisfaction of the officer in command of the ship into which he so enters, or of the consular officer, officer of customs, or other person, by whose sanction he is so discharged; and, thereupon, the fine is deducted as aforesaid, and an entry of the deduction must then be made in the official log-book, and signed by the officer or other person; and on the return of the ship to the United Kingdom, the fine itself must, in the case of foreign-going ships, be paid to the shipping master, before whom the crew is discharged; and, in the case of home-trade ships, to the shipping master at or nearest to the place at which the crew is discharged.⁴

In the previous letter, I have noticed the enactment of the Mercantile Marine Act, which prescribes certain periods of imprisonment for certain offences therein specified, which are made punishable on arrival at any place in which there is a court or justice capable of trying the offence, and that both imprisonment and forfeiture can be inflicted, if the case so requires; and, in reference to these, the act requires that, upon every legal conviction of any member of his crew, and upon every infliction of punishment, and upon commission of any offence, for which it is intended to procure punishment to be inflicted, enforce the forfeiture, or exact a fine,—the master must immediately cause a statement of the offence, and, in the case of a conviction or of punishments actually inflicted, a statement of that conviction or punishment, to

⁴ § 80.

be entered in the official log-book, and must cause this entry to be signed by a mate of the ship, or, if there is no mate, by the carpenter, boatswain, or one of the oldest members of the crew; and the master must also, from time to time, or at some time before the discharge of his crew, fill up the blanks, left for that purpose, in the official log-books, with true entries concerning the conduct and character of the several members of his crew; or he can, in a blank to be left for that purpose, state that he declines to give any opinion thereupon.⁵

The same statute also enacts, that, in every case of illness or injury, causing suspension of work, or of death, happening to any seaman or apprentice during the voyage, the master must cause an entry thereof, and, in the case of illness or injury, of the nature thereof, and of the medical treatment adopted, and, in the case of death, of the cause of death,—to be made in the official log-book, and signed by the mate, &c., as before, and by the surgeon or medical man on board, if any; and in case any seaman or apprentice cease to be a member of the crew, otherwise than by death on board, the master must also, thereupon, immediately cause an entry of the place, time, manner, and cause of that seaman or apprentice ceasing to be a member of the crew, to be made and signed as before.⁶

These are the statutory regulations by which your power over your crew is defined, during the course of a voyage; and I now proceed to consider the taking in of a cargo at a foreign port.

I am, &c.

5 13 and 14 V., c. 93, § 86. 6 § 87.

LETTER XX.

Death, desertion, &c., of seamen at foreign port—how to be supplied—if British seamen cannot be had, complement made up by foreigners—but must not sail without complement—instances of sailing without such—custom-house regulations in sailing from British possessions abroad—no goods can be exported from British possessions in America, unless to United Kingdom or some other of such possessions—except produce of fisheries or goods from Newfoundland or Labrador—no goods can be laden until due entry made and warrant granted—nor unless at some place for which an officer of customs appointed—or sufferance has been granted—or unless in presence, or with written permission, of proper officer—goods laden contrary, forfeited—before lading ship must make entry outwards—particulars of entry—penalty for lading before entry—before departure master must deliver in writing a *content*—particulars of content—certificate of clearance—penalty for departing without clearance, or for master delivering false content—in entry outwards goods must be expressly stated to be produce of such possession—and also in certificate—goods not so stated in certificate, to be deemed a foreign production—in timber cargoes during certain period, whole cargo must be below deck—certificate must be obtained to that effect—after certificate obtained, must not place any part of cargo above deck—unless in case of leak, &c.—store-spars, &c., not taken as part of the cargo—penalty for not obtaining certificate—or for placing part of cargo above deck—terms of timber trade between United Kingdom and United States—exportation of sugar, &c.—proprietor of estate must make declaration—particulars of declaration—must be delivered to collector, &c., by person entering goods—must also make declaration as to identical goods—before clearance, master must make and subscribe declaration of identity—thereupon clearance granted—particulars of clearance—entry must be made outwards of sugar, &c., if shipped from one British possession in America, as being the produce of another such—particulars of entry—certificate of production to be given—goods imported by land or inland navigation—trade with the Mauritius—powers of officers of customs to go on board, &c.—if prohibited goods on board, ship and cargo forfeited—penalty on master—vessels, &c., made use of in removing goods forfeited—penalty on persons assisting, &c.—or offering bribe, &c.—powers of officer under writ of assistance—vessels, &c., seized or forfeited, held as condemned—forfeited goods to be delivered to collector—claim to thing seized—and procedure under it—requisites of taking in cargo at foreign port, same as at home port—engagement for freight entered into by master himself—sailing from foreign port—seaworthiness of vessel—and conduct of voyage.

GENTLEMEN,

It is extremely probable that, owing to the death or desertion of some of your original crew, you may often find difficulty, at a foreign port, in filling up your necessary complement with British seamen; but you ought, on no account, to sail from a foreign port without a proper number of seamen to navigate the vessel to her port of destination, as her having so is, as I have already shown you, an essential ingredient of her seaworthiness. You will recollect, that no seaman can be shipped at a foreign port, except with the sanction of the British consul or vice-consul there, to be indorsed or certified on the agreement, under a penalty of £50 for each seaman shipped in breach of the act;¹ and if you cannot, on any reasonable terms, make up your proper complement with British seamen, you can replace them with foreigners, upon obtaining the certificate of the British consul, or of two British merchants, as required by the Merchant Seamen's Act. But you must not sail on the homeward voyage,—either with part of the crew engaged only to an intermediate port, not in the course of that voyage, intending there to replace them with others to the port of destination,—or with an incomplete crew, intending to make up your full complement at some other port in the voyage. Of each of these cases, I have already given you, an instance, which I may here repeat. As to the former,—a master was unable at Cuba, to engage ten men, his proper complement, for Liverpool, but he sailed from Cuba, with eight men, for Liverpool, and two for Jamaica; he proceeded to Jamaica, out of the ordinary track of the voyage,—landed the two men there, and took in other two,—and the vessel was lost on her voyage from Jamaica to Liverpool;—and, in an action on a policy of insurance, it was held, that, if eight men were, at the outset, sufficient for the voyage, the touching at Jamaica was a deviation,—and that, if eight men were not sufficient, the voyage had no commencement, the vessel not being seaworthy, in this respect, when she

¹ 7 and 8 V., c. 112, § 54.

SECTION 10.

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any officer of the customs is appointed
American... landing of goods, or at some place for which
entry... has been granted by the collector and as
land or... principal officer, but the landing of
officers of... can be so taken, except in the
board, ship... made use of the power of the proper
assisting, &c... writ of assistance... can make and arrest
demned—foreign... thing seized—any... otherwise any
cargo at foreign... freight entered into...
seaworthiness of vessel.

for removing any goods for shipment, as to them may be expedient, but all goods laden or waterborne contrary to the regulations of the act, or to such regulations as to be made and appointed, are to be forfeited.⁵

The master of every ship bound from any British possession abroad, (except the territories subject to the residencies of Fort William, in Bengal, Fort St. George, and Bombay,) must, before any goods be laden therein deliver to the collector or controller, or other proper officer, an entry outwards, under his hand, of the destination of such ship, stating her name, country, and tonnage,—and, if British, the port of registry,—the name and country of the master,—the country of the owners,—the number of the crew,—and how many are of the country of such ship,—and, if any goods be laden on board any ship before such entry be made, the master forfeits £50.⁶

Before the ship *depart*, the master must bring and deliver to the collector or controller, or other proper officer, a content in writing, under his hand, of the goods laden, and the names of the respective shippers and consignees of the goods, with the marks and numbers of the packages or parcels of the same,—and he must make and subscribe a declaration to the truth of such content, as far as any of such particulars can be known to him; and the master of every ship bound from any such possession, whether in ballast or laden, must, before departing, go before the collector or controller, or other proper officer, and answer all such questions concerning the ship and the cargo, if any, and the crew and the voyage, as are demanded of him by such officer. Thereupon the collector and controller, or other proper officer, if such ship be laden, must make out and give to the master, a certificate of the clearance of the ship for her intended voyage, containing an account of the total quantities of the several sorts of goods laden therein, or a certificate of her clearance in ballast, as the case may be. If the ship departs without such clearance, or if the master deliver a false content, or does not truly answer the questions demanded of him, he forfeits the sum of £100.⁷

5 § 29.

6 § 22.

7 Ibid.

sailed.² And, in the other instance, as to the latter,—in an action upon a policy on freight and goods, at and from Port Neuf to London, warranted to sail on or before the 28th October; on the 26th, the vessel, with an incomplete crew for the voyage, dropped down from Port Neuf, and, on the 28th, reached Quebec, the nearest place where a clearance could be obtained, and there completed her crew; on the 29th she obtained her clearance, and sailed next day, and was lost:—it was held, that the dropping down to Quebec was not a compliance with the warranty.³

In sailing *from* any of the British possessions abroad, there are certain custom-house regulations, which you have to attend to, and with which it is, therefore, absolutely necessary you should be well acquainted.

By the 8th and 9th V., c. 93, it is enacted, that no goods, except the produce of the fisheries in British ships, shall be exported from any of the British possessions in America, by sea to any place other than the United Kingdom, or some other of such possessions, except from the several ports in such possessions, called "free ports," enumerated or described in the table given in the act; but nothing contained in the act extends to prohibit the exportation of goods from any of the ports or places in Newfoundland or Labrador, in British ships.⁴

No goods can be laden, or waterborne to be laden, on board any ship in any of the British possessions in North America, the Mauritius, or the islands of Jersey, Guernsey, Alderney, or Sark, until due entry has been made of such goods, and warrant granted for lading the same; and no goods can be so laden or waterborne, except at some place at which an officer of the customs is appointed to attend the lading of goods, or at some place for which a sufferance has been granted by the collector and controller, or other principal officer, for the lading of such goods, and no goods can be so laden, except in the presence, or with the permission in writing, of the proper officer. The commissioners of customs can make and appoint such other regulations for carrying coastwise any goods,

² Forshaw v. Chabert; 3 B. B. 158.

³ Rededale v. Newsham, 24th January, 1815; 3 M. S. 456.

4 § 2.

or for removing any goods for shipment, as to them may seem expedient, but all goods laden or waterborne contrary to the regulations of the act, or to such regulations so to be made and appointed, are to be forfeited.⁵

The master of every ship *bound from* any British possession abroad, (except the territories subject to the presidencies of Fort William, in Bengal, Fort St. George, and Bombay,) must, before any goods be laden therein deliver to the collector or controller, or other proper officer, an entry outwards, under his hand, of the destination of such ship, stating her name, country, and tonnage,—and, if British, the port of registry,—the name and country of the master,—the country of the owners,—the number of the crew,—and how many are of the country of such ship,—and, if any goods be laden on board any ship before such entry be made, the master forfeits £50.⁶

Before the ship *depart*, the master must bring and deliver to the collector or controller, or other proper officer, a content in writing, under his hand, of the goods laden, and the names of the respective shippers and consignees of the goods, with the marks and numbers of the packages or parcels of the same,—and he must make and subscribe a declaration to the truth of such content, as far as any of such particulars can be known to him; and the master of every ship bound from any such possession, whether in ballast or laden, must, before departing, go before the collector or controller, or other proper officer, and answer all such questions concerning the ship and the cargo, if any, and the crew and the voyage, as are demanded of him by such officer. Thereupon the collector and controller, or other proper officer, if such ship be laden, must make out and give to the master, a certificate of the clearance of the ship for her intended voyage, containing an account of the total quantities of the several sorts of goods laden therein, or a certificate of her clearance in ballast, as the case may be. If the ship departs without such clearance, or if the master deliver a false content, or does not truly answer the questions demanded of him, he forfeits the sum of £100.⁷

5 § 29.

6 § 22.

7 *Ibid.*

No goods can be stated in such certificate of clearance of any ship from any British possession, to be the produce of such possession, unless such goods are expressly stated so to be, in the entry outwards of the same; and all goods not expressly stated in such certificate of clearance to be the produce of such possession, are, at the place of importation in any other such possession, or in the United Kingdom, to be deemed to be of foreign production.⁸

In reference to timber cargoes, the same statute also enacts, that, before any clearing officer permits any vessel, wholly or in part laden with timber or wood goods, to clear out from any British port in North America, or in the settlement of Honduras, for any port in the United Kingdom, at any time after 1st September, or before 1st May, in any year, he must ascertain that the whole of the cargo is below deck, and must give the captain, or other person having the command of that vessel, a certificate to that effect, and no captain or other person having command of any vessel so laden, can sail from any of the aforesaid ports, for any port of the United Kingdom, at any such time as aforesaid, until he obtains such certificate from the clearing officer.⁹ No captain, owner, supercargo, or other person, having command of any vessel, in respect of which such certificate has been obtained, must place or permit, or cause to be placed, or to remain or be, upon or above the deck of such vessel, any part of the cargo thereof, until such vessel has arrived at the port of her destination. But if the captain, or other person having the command of the vessel, should consider it necessary, in consequence of springing a leak, or of other damage received or apprehended, during the voyage, to remove any portion of the cargo upon deck, he may remove, or cause to be removed, upon the deck of the vessel, so much of the cargo, and the same may remain there for such time as he considers expedient, although store-spars, or other articles necessary for the vessel's use, are not to be taken to be cargo, for the purposes of the act.¹ But if any captain or other person having the command of a vessel, for which the aforesaid certificate is required by the act, sails, or attempts

to sail, without having obtained such certificate, or places or permits, or causes to be placed, or to remain, or be, upon or above the decks of the vessel, any part of the cargo thereof, except in the cases in which the same is not forbidden by the act, he, for every offence, forfeits and pays any sum not exceeding £100.²

In connection with the timber trade, you will require to observe, that, by the treaty between this country and the United States, it is stipulated, that all the produce of the forest, in logs, lumber, timber, timber boards, staves, or shingles, or of agriculture, (not being manufactured,) grown on any of those parts of the State of Maine, watered by the St. John, or the tributaries of that river, (of which reasonable evidence has to be produced, if required,) must have free access into and through that river and its tributaries, having their source within the State of Maine, to and from the seaport at the mouth of the St. John, and to and from the falls of that river, either by boats, rafts, or other conveyance; and, when within the province of New Brunswick, the said produce must be dealt with as if it were the produce of that province. And, therefore, it is enacted, that the produce, in that treaty, and before described, is, so far as regards all laws relating to duties, navigation, and customs, in force in the United Kingdom, or in any one of her Majesty's dominions, to be deemed and taken to be, and to be dealt with, as the produce of New Brunswick. But, in all cases in which declarations and certificates of production or origin, and certificates of clearance, would be required, in respect of such produce, if it were the produce of New Brunswick, similar declarations and certificates are required in respect of such produce, and must state the same to be the produce of those parts of the State of Maine, watered by the St. John, or by its tributaries.³

Before any sugar, coffee, cocoa, or spirits can be shipped for exportation, in any British possession in America, or in the island of Mauritius, as being the produce of such possession, or of said island, *the proprietor of the estate* on which such goods were produced, or his known agent, must make and sign a declaration in

writing, before the collector, controller, or other officer of customs, at the port of exportation, or before one of her Majesty's justices of the peace, residing in or near the place where such estate is situated, declaring that such goods are the produce of that estate; and this declaration must set forth the name of the estate, and the description and quantity of the goods, and the packages containing the same, with the marks and numbers thereon, and the name of the person to whose charge, at the place of shipment, they are to be sent; and if any justice of peace, or other officer aforesaid, subscribe his name to any writing, purporting to be such a declaration, unless the person purporting to make the same do actually appear before him, and declare to the truth of the same, such justice of the peace, or other officer aforesaid, must forfeit and pay, for any such offence, the sum of £50; and the person entering and shipping such goods, must deliver such declaration to the collector or controller, or such other proper officer, and must make and subscribe a declaration before him, that the goods to be shipped by virtue of such entry are the same as mentioned in the first-mentioned declaration. The master of the ship in which such goods are laden must, before clearance, make and subscribe a declaration, before the collector or controller, or other proper officer, that the goods shipped by virtue of such entry, are the same as those mentioned, and intended, in the first-mentioned declaration, to the best of his knowledge and belief, and, thereupon, the collector or controller, or other proper officer, must sign and give to the master a certificate of production, stating that proof has been made in manner required by law, that the goods described are the produce of such British possession, or of the said island, and setting forth in such certificate the name of the exporter,—of the exporting ship,—of the master thereof,—and the destination of the goods. If any sugar, coffee, or spirits be imported into any British possession in America, as being the produce of some other such possession, or of the said island, without such certificate of production, the same are to be forfeited.⁴

Before any sugar, coffee, cocoa, or spirits can be shipped for exportation in any British possession in America, as being the produce of some other such possession, *the person exporting the same* must, in the entry outwards, state the place of production, and refer to the entry inwards, and the landing of such goods, and must make and subscribe a declaration, before the collector or controller, to the identity of the same; and, thereupon, if such goods have been duly imported, with a certificate of production, within twelve months prior to the shipping for exportation, the collector and controller must sign and give to the master a certificate of production, founded upon and referring to the certificate of production under which such goods had been so imported, and containing the like particulars, together with the date of the importation.⁵

Any goods which might be lawfully imported by sea, into any British possession in America, from any adjoining foreign country, may be lawfully brought or imported, by land or inland navigation, into such possession, from such country, in the vessels, boats, and carriages of that country, as well as in British vessels, boats, or carriages; but goods cannot be so brought or imported, except into some port or place of entry, at which a custom-house now is, or may hereafter be, lawfully established.⁶

All goods, wares, and merchandise, the growth, produce, or manufacture of the island of Mauritius, and all goods, &c., which, having been imported into that island, may be imported from thence into any part of the United Kingdom of Great Britain and Ireland, or into any possession of her Majesty,—are liable, upon such importation into the United Kingdom, or into any such possessions, respectively, and are subject to the same regulations as the like goods, wares, and merchandise,—being of the growth, produce, or manufacture of her Majesty's West India islands, or having been imported into, or exported from, any of these islands, and imported from the same into the United Kingdom, or into any such possessions, respectively,—would, on such importation,

be liable to the payment of, or be subject unto, and upon the exportation of any goods, &c., from the United Kingdom to the island of Mauritius, such goods, &c., are liable to the same duties, and entitled to the like drawbacks, respectively, as would or ought by law to be charged or allowed upon the like goods, from the United Kingdom to any of the said islands in the West Indies; and all goods, &c., imported into, or exported from, the island of Mauritius, from or to any place whatever, other than the United Kingdom, are, upon such importation or exportation, liable to payment of the same duties, and are subject to the same regulations, so far as any such regulations can or may be applied, as the like goods, &c., would be liable to the payment of, or would be subject upon importation into, or exportation from, any of the said islands in the West Indies; and all ships and vessels whatever, which arrive at or depart from the said island of Mauritius, are liable to the payment of the same duties, and are subject to the same regulations, as such ships or vessels are liable to the payment of, or are subject to, if arriving at or departing from any of the said West India islands.⁷

It is lawful for the officers of the customs to go on board any ship, in any port in any British possession in America, and to rummage and search all parts of the ship, for prohibited and uncustomed goods, and also to go on board any ship hovering within a league of any of the coasts thereof; and, in either case, freely to stay on board such ship, as long as she remains in such port, or within such distance. If such a ship be bound elsewhere, but continue so hovering for the space of twenty-four hours, after the master has been required to depart, it is then lawful for the officer of the customs to bring such ship into port, and to search and examine her cargo, and to examine the master, on oath, touching the cargo and voyage; and if there be any goods on board prohibited to be imported into such possession, the ship and her cargo are to be forfeited, and if the master do not truly answer the questions which may be demanded of him, on such examination, he forfeits the sum of £100.⁸

All vessels, boats, carriages, and cattle made use of in the removal of any goods made liable to forfeiture, under the act, or any other act relating to the customs, or to trade or navigation, are to be forfeited; and every person who assists, or is otherwise concerned, in the unshipping, landing, or removal, or in the harbouring of such goods, or into whose hands or possession the same may knowingly come,—forfeits the treble value thereof, or the penalty of £100, at the election of the officers of the customs.⁹ All goods, and all ships, vessels, or boats, and all carriages, and all cattle liable to forfeiture as aforesaid, can be seized and secured by any officer of the customs or navy, or by any person employed for that purpose, by or with the concurrence of the commissioners of customs; and every person who may, in any way, hinder, oppose, molest, or obstruct any officer of the customs or navy, or any person so employed as aforesaid, or any person acting in his aid or assistance,—for every such offence forfeits the sum of £200.¹ And every person who gives, or offers, or promises to give, or procures to be given, any bribe, recompense, or reward to, or makes any collusive agreement with, any such officer or person aforesaid, in any of her Majesty's possessions abroad, to induce him, in any way, to neglect his duty, or to do, conceal, or connive at any thing whereby the provisions of that or any other such act may be evaded, forfeits the like sum of £200.²

Under the authority of a writ of assistance, granted by the Superior or Supreme Court of Justice, or Court of Vice-Admiralty having jurisdiction in the place, on application of the principal officer of the customs, it is lawful for any officer of the customs, taking with him a peace officer, to enter any building or other place in the day-time, and to search for, seize, and secure any goods liable to forfeiture as aforesaid, and, in case of necessity, to break open any doors, and any chests or other packages for that purpose; and such writ of assistance, when once issued, is in force during the whole of the reign in which it has been granted, and for twelve months from the conclusion thereof.³ If any person, by force or violence,

assault, resist, oppose, molest, hinder, or obstruct any officer of the customs or navy, or other person employed as aforesaid, in the exercise of his office, or any person acting in his aid or assistance,—such person being convicted thereof, is adjudged a felon, and must be proceeded against as such, and punished at the discretion of the court before whom he may be tried.⁴

All vessels, boats, &c., which have been, or may hereafter be, seized or forfeited, in or near any of the British possessions abroad, under that or any act relating to the customs, or to trade or navigation, are deemed and taken to be condemned, and may be dealt with in the manner directed by law, in respect to vessels, boats, &c., seized and condemned for breach of any such act, unless the person from whom any such vessel, boat, &c., may have been seized, or the owner of them, or some person authorised by him, do, within one calendar month from the day of seizing the same, give notice in writing to the person or persons seizing, or to the collector, controller, or other chief officer of customs at the nearest port, that he claims, or intends to claim the vessel, &c.⁵ All things which may be seized as being liable to forfeiture as aforesaid, must be taken forthwith, and delivered into the custody of the collector and controller of the customs, at the custom-house nearest to the place where the same were seized, who must secure the same by such means, and in such manner, as may be provided and directed by the commissioners of customs; and, after condemnation thereof, the collector and controller must cause the same to be sold by public auction to the best bidder. The commissioners can direct in what manner the produce of such sale is to be applied, or in lieu of sale, to direct that any of such may be destroyed or reserved for the public service.⁶

No claim to anything seized under the present or any act relating to the customs, or to trade or navigation, and returned into any of her Majesty's courts for adjudication, can be admitted, unless the claim be entered in the name of the owner, with his residence and occupation, nor unless oath to the property in such thing be made

⁴ § 71.⁵ § 69.⁶ § 72.

by the owner, or by his attorney or agent, by whom such claim is entered, to the best of his knowledge and belief. Every person making a false oath thereto is deemed guilty of a misdemeanor, and is liable to the pains and penalties to which persons are liable for a misdemeanor.⁷ But no person can be admitted to enter a claim to anything seized, in pursuance as aforesaid, and prosecuted in any of the British possessions in America, until sufficient security has been given in the court in which such seizure is prosecuted, in a penalty not exceeding £60, to answer and pay the costs occasioned by such claim; and, in default of giving this security, such things must be adjudged to be forfeited, and are to be condemned.⁸ But when goods or ship are seized as forfeited, as aforesaid, and detained in any of the British possessions in America, the judge or judges of any court having jurisdiction to try and determine such seizures, can, with the consent of the collector and controller of the customs, order the delivery thereof, on security by bond, with two sufficient securities, to be first approved by that collector and controller, to answer double the value of the same, in case of condemnation; and such bond must be taken to the use of her Majesty, in name of the collector or officer of the customs, in whose custody the goods, or ship, or vessel, may be lodged, and must be delivered and kept in the custody of such collector or officer. In case the goods, &c., be condemned, the value thereof must be paid into the hands of such collector or officer, who, thereupon, with the consent or privity of his controller, cancels such bond.⁹

These are the laws relative to the exportation of goods from any of the British possessions abroad; and, I need not say anything here, in addition to what I have already said, as to the manner of taking in and loading a cargo at a foreign port. You should bear in mind, that it is necessary to make protests, when requisite, in loading at a foreign, equally as in a home port, and even more so; and you ought to bring the instruments of protest along with you. In a previous letter, I have noticed some cases, in which vessels had been engaged to arrive

7 § 77.

8 § 78.

9 § 74.

at an outward port by a certain day, and, if a vessel should fail so to arrive, the merchant has the option of loading or not; but, here, suppose the merchant has furnished part of the agreed-on cargo, under a contract to load the vessel with an entire cargo, and he, however, is unable fully to load the vessel in terms of that contract,—what, then, should you do? If the merchant is in good credit, or otherwise responsible, and should he announce to you, that he is unable to load the full cargo agreed for, you ought not to sail with what has been loaded, unless under his express sanction, or, at least, without intimating to him, by a protest, that you are to sail by a day certain, with that part of the cargo which may be on board; and neither ought you to fill up the vessel with the goods of other parties, without his express consent. But, should there be a reasonable doubt of his credit or responsibility, there is little risk in filling up the vessel with the goods of others, so as to secure a full freight. The same remarks apply, where the merchant altogether fails to provide a cargo; and I should consider it an extreme case, indeed, which would warrant a master in returning with an empty ship, and trusting to the recovery of damages from the freighter.¹

But it may happen, that you yourself must enter into contracts or engagements for the employment of your vessel. Of course, where your owners themselves have made a special contract for that employment, you cannot, under any general or implied authority, annul, alter, or vary that contract, or substitute another in its place. In a general ship, you have an implied authority to bind your owners, in every contract relative to the usual employment of such a ship;² and in regard to the employment of the vessel, whether as a general ship or otherwise, the general rule is, that the owners are bound to the performance of every lawful contract made by you as the master, and in the usual course of that employment.³ In a foreign port, you are the only recognised representative of your owners, and, therefore, a charter-party made by you, in your own name, in such a port,

¹ Abbot, 249.

² Abbot, 128.

³ Abbot, 124.

and in the usual course of the ship's employment, and without fraud, is binding both upon yourself and your owners.

In sailing from a foreign port, the same as sailing from a home port, you must take care that your vessel is sufficiently seaworthy for the intended voyage. But there is a distinction as to seaworthiness, which it is necessary for you to keep in view. It cannot be expected, that, at the termination of a long outward voyage, and before the commencement of the homeward voyage, the vessel will be as well found, as at the commencement of the former; but still, she must be in a state of seaworthiness, commensurate to the risk of the homeward voyage. If an insurance has been effected on the voyage out and home, and the vessel has sustained some trifling damage in the outward voyage, from the ordinary perils of the sea, then the warranty of seaworthiness will not be broken; but, if, in the outward voyage, the vessel has been so damaged by these perils, as to give rise even to a doubt as to her seaworthiness, at the termination of that voyage and previous to the commencement of the homeward voyage, then, if she can be repaired within a reasonable time,—with reasonable care,—and at small expense, there can be undoubtedly no question, that she must be so, before sailing on the homeward voyage, so as to avoid all questions between your owners and the shippers, or the underwriters, as to the vessel's state of seaworthiness at the time of her sailing from the foreign port.⁴ It is extremely foolish to hear shipmasters boast (as too many do) of having brought their vessel, when unseaworthy, across the Atlantic without repair, and of their having been complimented by the underwriters for bringing her safe into port; whereas, in place of this showing their good seamanship, it only shows their ignorant or thoughtless foolhardiness, and it is what no prudent shipmaster ought, on any account, to do. But, again, if there is a separate insurance on the homeward voyage, independent altogether of the outward voyage, and the risk on which only commences at and from the outward port

⁴ *Hollingworth v. Broderip*, 26th May, 1837; 7 A. E. 40.

of lading, in that case, the vessel must be in the same complete state of seaworthiness, before sailing, as she must be before leaving her home port; and I need not repeat what I have already said upon that head, in a previous letter.

I am, &c.

LETTER XXI.

Returning to the United Kingdom—bulk cannot be broken within four leagues of coast—nor goods unladen, nor alteration made in stowage—penalty for doing so—manifest must be on board—what it must contain—penalty for goods imported and not in manifest, or for goods in manifest and not on board—master must produce manifest to customs officer who comes on board within four leagues of the coast—and, if demanded, must deliver a true copy—and another to the officer who first demands it within the limits of the port—penalty for not doing so—master must report within twenty-four hours of arrival, and before breaking bulk—particulars of report—penalty on failure—Africans on board, master or owner bound to give bond to maintain—packages reported “contents unknown” may be opened and examined—master must deliver manifest, and, if required, bill of lading, or copy, and answer questions as to voyage—penalty for failing to produce, or producing false manifest, bill of lading, or copy, or failing to answer questions, or not answering them truly—part of cargo reported for another port—ship must come quickly up to place of unloading, and bring to at stations for officers boarding—penalty for not doing so—mooring places for tobacco ships—goods unshipped from importing vessel, or landing contrary to custom’s regulations, to be forfeited—penalty on persons concerned—officers of customs can board ships, and must have access to all parts—can seal or secure goods, and open locks—concealed goods forfeited—penalties—*after* fourteen days, officer may bond goods not entered, and small packages, &c., *before* fourteen days—if duties and charges not paid in three months, goods may be sold—goods remaining on board vessel longer than time allowed, goods and vessel may be detained till charges paid—times and places for landing goods from beyond seas, and manner of doing so—special regulations as to certain descriptions of goods—coasting trade defined—dutiable goods carried into Isle of Man—notice of arrival to be given before unloading goods, and proper documents obtained—particulars of notice—must be given within twenty-four hours of arrival—in coasting trade to and from Ireland, master must attend and deliver notice—cargo-book must be kept—penalties for false entries in—transires must be delivered before unloading goods—times and places for unshipping goods brought coastwise.

GENTLEMEN,

Let me assume that you are again approaching the shores of this country, laden with goods from parts beyond seas, it is necessary that you should be ac-

quainted with the powers of the customs' officers, and the customs' regulations.

The act for the general regulation of the customs, enacts, that no goods must be unladen from any ship arriving from parts beyond the seas, at any port or place in the United Kingdom, or in the Isle of Man, nor must bulk be broken after the arrival of the ship within four leagues of the coasts of any of these countries, before due report of the ship, and due entry of the goods, has been made, and warrant granted, as directed by the act; and no goods must be so unladen, except at such times and places, and in such manner, and by such persons, and under the care of such officers, as the act directs. If, after the arrival of the ship within four leagues of the coast, any alteration be made in the stowage of the cargo, so as to facilitate the unlading of any part thereof, or if any part be staved, destroyed, or thrown overboard, or any package be opened, the ship is deemed to have broken bulk. But diamonds and bullion, fresh fish of British taking, and imported in British ships, and fresh lobsters, however taken or imported, may be landed in the United Kingdom, without report, entry, or warrant.¹

All goods not duly reported, or which shall be unladen contrary to the act, are declared to be forfeited; and if bulk be broken contrary thereto, the master forfeits the sum of £100.²

No goods must be imported into the United Kingdom, or into the Isle of Man, from parts beyond the seas, or in any British ship, unless the master has on board a manifest of such goods, made out, and dated and signed by him, at the place or places where the same, or the different parts of the same, have been taken on board, and authenticated as after mentioned. This manifest must set forth the name and tonnage of the ship,—the name of the master, and of the place to which the ship belongs,—of the place or places where the goods were respectively taken on board,—and of the place or places for which they are destined respectively; and must also contain a particular account and description of all

¹ 8 and 9 V., c. 86, § 2.

² Ibid.

the packages on board, with the marks and numbers thereon, and of the sorts of goods, and different kinds of each sort contained therein, to the best of the master's knowledge, and the general denomination of the contents of every package containing the following articles imported from any foreign place in Europe, viz., cambrics or lawns, leather gloves, manufactures of silk, tobacco, cigars, or snuff, and the particulars of such goods as are stowed loose, and the names of the respective shippers and consignees, as far as the same can be known to the master. To this particular account, must be subjoined a general account or recapitulation of the total number of the packages of each sort, describing the same by their usual names, or by such descriptions as the same can be best known by, and the different goods therein, and also the total quantities of the goods stowed loose; and all such cambrics or lawns, &c., not so manifested, are to be forfeited.³

If any goods be imported into the United Kingdom, or into the Isle of Man, in any British ship, without such manifest, or if any goods in such manifest, be not on board, the master forfeits the sum of £100.⁴

The master of every ship required to have a manifest on board, must produce that manifest to any officer of the customs who comes on board his ship, after her arrival within four leagues of the coast of the United Kingdom, or of the Isle of Man, and who demands the same for his inspection; and the master must also deliver to any such officer, who is the first to demand it, a true copy of such manifest, signed by himself, and must also deliver another copy to any other officer of the customs, who is the first to demand the same, within the limits of the port to which the ship is bound. Thereupon, these officers, respectively, must notify upon the manifest, and on the copies, the date of the production of that manifest, and of the receipt of these copies, and must transmit the copies to the collector and controller of the port to which the vessel is first bound, and must return the principal manifest to the master. If the master does not, in any case, produce the manifest, or deliver the copy, he forfeits £100.⁵

The master of every ship arriving from parts beyond the seas, at any port in the United Kingdom, or in the Isle of Man, whether laden or in ballast, must, within twenty-four hours after such arrival, and before bulk be broken, make due report of his ship, and must make and subscribe a declaration to the truth of the same, before the collector and controller of that port. This report must contain an account of the particular marks, numbers, and contents, of all the different packages or parcels of the goods on board the ship, and the particulars of any goods stowed loose, to the best of his knowledge, and the general denomination of the contents of every package containing cambrics or lawns, &c., imported from any foreign port in Europe; and of the place or places where such goods were respectively taken on board, and of the burden of the ship, and of the country where the ship was built; or, if British, of the port of registry, and of the country of the people to which the ship belongs, and of the name and country of the person who was master during the voyage, and of the number of the people by whom the ship was navigated, stating how many are the subjects of the country to which the ship belongs, and how many are of some other country. In this report, it must be further declared whether, and in what cases, the ship has broken bulk in the course of her voyage, and what part of the cargo, if any, is intended for importation at that port, and what part, if any, is intended for importation at another port in the United Kingdom or Isle of Man, or what part, if any, is prohibited to be imported, except to be warehoused for exportation only, and what part, if any, is intended for exportation in that ship to parts beyond the seas, and what surplus stores or stock remain on board the ship; and, if a British ship, what foreign-made sails or cordage, not being standing or running rigging, are on board the ship. If the master fails to make such report, or makes a false report, he forfeits the sum of £100.^s

The master of every vessel coming from the coast of Africa, and having taken on board at any place in Africa, any person or persons being, or appearing to be, natives

of Africa, must, in addition to all other matters, state in the report of his vessel, how many such persons have been taken on board by him in Africa; and any master failing therein, forfeits the sum of £100. And the master or owner or owners of such vessel, or some or one of them, must, at the time of making such report, enter into bond to her Majesty, in the sum of £100, conditioned, to keep harmless any parish, or any extra parochial or other place maintaining its own poor, against any expenses which such parish or other place may be put to, in supporting any such person during their stay in the United Kingdom. Any master, owner, or owners, refusing or neglecting to enter into such bond, forfeits the sum of £200.⁷

If the contents of any package, intended for exportation in the same ship, to parts beyond the seas, as before mentioned, be reported by the master as unknown to him, it is lawful for the officers of the customs to open and examine such package on board, or to bring the same to the Queen's warehouse, for that purpose. If there be found in such package, any goods which may not be entered for home use, such goods are to be forfeited; or, if the goods be such as may be entered for home use, the same are chargeable with the duties on importation, unless, in either case, the commissioners of customs, in consideration of the sort or quality of these goods, or the small rate of duty payable thereon, should see fit to deliver the same for exportation.⁸

The master of every ship must, at the time of making his report, deliver to the collector or controller, the manifest of the cargo of his ship, where a manifest is required; and, if required by the collector or controller, must produce to him any bill or bills of lading, or a true copy thereof, for any and every part of the cargo laden on board, and must answer all such questions relating to the ship and cargo, and crew and voyage, as may be put to him. In case of failure or refusal to produce the manifest, or to answer the questions, or to answer them truly, or to produce the bill of lading or copy, or, if the manifest, or bill of lading or copy, be false, or if any bill

of lading be uttered or produced by any master, and the goods expressed therein have not been *bona fide* shipped on board the ship, or, if any bill of lading uttered or produced by any master, has not been signed by him, or any such copy has not been received or made by him, previously to his leaving the place where the goods expressed in that bill of lading or copy were shipped, then, and in every such case, the master forfeits the sum of £100.⁹ If any part of the cargo for which a manifest is required, be reported for importation at some other port in the United Kingdom, or at some other port in the Isle of Man, respectively, the collector and controller of the port at which some part of the cargo has been delivered, must notify such delivery on the manifest, and return the same to the master.¹

Every ship must come as quickly up to the proper place of mooring or unlading, as the nature of the port will admit, and without touching at any other place, and, in proceeding to such place of mooring or unlading, must bring to at stations appointed by the commissioners of customs for the boarding of ships by the officers of customs,—and, after arrival at such place of mooring or unlading, the ship must not remove from such place, except directly to some other place, and with the knowledge of the proper officer of the customs, on penalty of £100, to be paid by the master. But the commissioners of customs may appoint places to be the proper places for the mooring or unlading of ships importing tobacco, and where such ships only can be moored or unladen; and, in case the place so appointed for the unlading of these ships, be not within some dock surrounded with walls, if the ship, after having been discharged, remain at that place, or if any ship not importing tobacco, should be moored at that place, in either case, the master forfeits and pays the sum of £20.²

No goods imported into the United Kingdom from parts beyond the seas, can be unshipped or carried from the importing vessel, to any quay, wharf, or other place, previously to the examination thereof, except under such rules, regulations, and instructions, as the commissioners

9 § 10.

1 § 11.

2 § 12.

of customs may, from time to time, with the approbation of the commissioners of the treasury, direct and appoint; and all goods unshipped or carried contrary to any of such rules, regulations, or instructions, are forfeited, together with the craft, or other means, used for the conveyance of such goods; and every person knowingly concerned in the unshipping or carrying of such goods, or to whose hands and possession these may knowingly come, contrary to such rules, regulations, and restrictions, forfeits and pays a sum of £100, or treble the value of the goods, at the election of the commissioners of customs.³

It is lawful for the proper officer of the customs, to board any ship arriving at any port in the United Kingdom or Isle of Man, and freely to stay on board, until all the goods laden therein have been duly delivered from the ship; and these officers must have free access to every part of the ship, and have power to fasten down hatches, to mark any goods before landing, and to lock up, seal, mark, or otherwise secure, any goods on board the ship; and if any place, or any box be locked, and the keys be withheld, the officers of the customs, if they be of a degree superior to tidesmen or watermen, can open any such place, box, or chest, in the best manner in their power; but if they be tidesmen or watermen, or only of that degree, they must send for their superior officer, who can open, or cause to be opened, any such box, place, or chest, in the best manner in his power. If any goods are found concealed on board such a ship, they are forfeited; and if the officers of the customs place any lock, mark, or seal, upon any goods, or ship's stores, on board, and if that lock, mark, or seal, should be wilfully opened, altered, or broken, before due delivery of such goods, or if any of such goods be secretly conveyed away, or if the hatchways be opened after having been fastened down, the master forfeits the sum of £100 in the first case, and £200 in the second.⁴

It may be proper to inform you of another enactment in the Custom's Act, which requires, that every importer of goods, must, within fourteen days after arrival of the

3 § 13.

4 § 14. 12 and 13 V., c. 93, § 7.

importing ship, make perfect entry inwards of these goods, or make entry by bill of sight, as provided by the act, and must also land the goods within the same period. In default of such entry being made, and of the goods being so landed, it is lawful for the officers of the customs to convey the goods to the Queen's warehouse; and, whenever the cargo of any ship has been discharged, excepting only a small quantity of the goods, the officers of the customs can convey the remaining goods, and can, at any time, convey any small packages or parcels of goods to the Queen's warehouse, although these fourteen days have not expired, and such must be kept there waiting the entry thereof, during the remainder of the fourteen days. If the duties, due upon any goods so conveyed to the Queen's warehouse, be not paid within three months after these fourteen days are expired, together with all charges of removal and warehouse rent, the same must be sold, and the produce applied,—first to the payment of the freight and charges,—then to payment of the duties,—and the overplus, if any, is paid over to the proprietor.⁵

Whenever an officer of the customs is kept in charge of any goods, beyond the time allowed by law, for the same being entered and landed, it is lawful for the officer to detain the vessel in which these goods have been imported, if the same are remaining on board, until the expenses have been paid to the person appointed by the commissioners of customs to receive the same. In all cases where the goods have been put out of the vessel, the person or persons in whose names the same have been entered, must pay to the person so appointed as aforesaid, all such expenses as may have been so incurred by such officer, and the goods can be detained until these expenses have been paid; and, if not paid within one month after these have been demanded in writing, from such person or persons, by any officer of the customs, the goods can be sold, and the proceeds applied,—first to the payment of the freight and charges,—next, to the payment of the duties,—next, to payment of the officer's expenses, and of the charges attending: the

seizure and sale of the goods,—and the overplus, if any, is paid to the proprietor.⁶ When, in any of the instances mentioned in these two sections, the cargo, or part of the cargo, is sold to the customs' authorities, payment of the freight of these goods is secured from the proceeds, in the first place.

As to the times of unloading vessels from beyond seas, the same act also enacts, that no goods whatever (except diamonds, bullion, fresh fish of British taking, and imported in British ships, and lobsters,) must be unshipped from any ship arriving from parts beyond the seas, or landed, or put on shore, but only on days not being Sundays or holidays, and in the daytime, viz.,—from the 1st September until the last day of March, between sun-rising and sun-setting,—and, from the last day of March to the 1st day of September, between the hours of seven in the morning and four in the afternoon; nor must such goods (except as aforesaid) be so unshipped or landed, unless in the presence or with the authority of the proper officer of the customs. These goods (except as aforesaid) must be landed at one of the legal quays, appointed for the landing of goods, or at some wharf, quay, or place appointed by the commissioners of customs for the landing of goods by sufferance; and no goods (except as aforesaid) after having been unshipped, must be transhipped, or after having been put into any boat, or craft, to be landed, must be removed into any other boat or craft previous to their being duly landed, without the permission or authority of the proper officer of the customs.⁷

These are the statutory enactments as to goods brought foreign, which you, as masters, require to attend to; and, although, in the importation of certain goods from certain countries or places, a particular form of certificate or declaration, under the hand of the master, must be produced before entry can be made, yet, as the having and producing of these certificates and declarations, and the procuring of the goods duly entered, are, in such cases, more the interest and duty of the importer or consignee, I consider it unnecessary to trouble you with these in detail; and I subjoin, in a foot-note, the

⁶ § 17.

⁷ § 50.

particular produce and countries to which the several enactments of the statute applies.*

* 1st. Before any sugar, coffee, cocoa, or spirits, be entered as the produce of some British possessions in America, or the island of Mauritius, the master must deliver a certificate to the collector or controller, under the hand of the proper officer of the place where such goods were taken on board, that such are the produce thereof, and the master must make and subscribe a declaration, that this certificate was received at the place where the goods were taken on board, and that the goods so imported are the same as there mentioned. (§ 38.)

2nd. Before any sugar be entered as the produce of any of the British possessions within the limits of the East India Company's charter, the master must deliver a certificate under the hand and seal of the proper officer, at the place where the sugar was taken on board, that the same was declared by the shipper to be, really and truly, the produce of such British possession, and the master must subscribe a declaration to the same effect as already mentioned. (§ 39.)

3rd. If any sugar, the produce as last mentioned, be imported into the Cape of Good Hope, from the place of production, accompanied by a certificate of origin, and warehoused at the Cape, and exported from such warehouse, accompanied by a certificate from the proper officer of the customs there, in terms of the act, such certificate must be delivered by the master to the collector or controller at the port of importation, and he must make and subscribe a declaration before either of these officers, that such certificate was received by him at the Cape, and that the sugar so imported is the same as therein mentioned. (§ 40.)

4th. Before any wine be entered as the produce of the Cape, the master must deliver to the collector or controller, a certificate under the hand of the proper officer there, that proof had been made of such wine having been the produce of the Cape, stating the quantity, and sort, and the number and denomination of the packages in which it is contained; and the master must make and subscribe a declaration to the same effect as before mentioned. (§ 41.)

5th. Before any goods be entered as being the produce of Jersey, Guernsey, Alderney, Sark, or Man, the master must deliver to the collector or controller, a certificate from the governor, lieutenant-governor, or commander-in-chief of the island whence the goods were imported, that proof had been made of such goods having been the produce of that island. (§ 43.)

6th. Before cured fish, of British taking and curing, and imported in British ships, can be entered, free of duty, as being of such taking and curing, the master must make and subscribe a declaration, before the collector or controller, that the fish were actually so caught and taken, in British ships, and cured by the crews thereof, or by her Majesty's subjects. (§ 46.)

7th. Before any blubber, train oil, spermaceti oil, head matter, or whale fins, can be entered, as being the produce of fish, or creatures living in the sea, taken and caught wholly by her Majesty's subjects, usually residing in some part of her Majesty's dominions, and imported from some British possession, the master must deliver to the collector or controller, a certificate under the hand of the proper officer, of the possession where these were taken on board, or, if none such reside there, then, under the hands of two principal inhabitants at the place of shipment, that the shipper had made a declaration before him or them, of the same being the produce of fish, or creatures living in the sea, taken wholly by British vessels, owned and navigated according to law; and the master must make and subscribe a declaration the same as before mentioned. (§ 47.)

8th. Before any blubber, &c., (as before,) imported direct from the fishery, can be entered, as being the produce of fish, or creatures living in the sea, taken and caught wholly by the crews of British ships, cleared out from the United Kingdom, or from any British possession, the master must make and subscribe a declaration, and the importer must do the same, that these are the produce of fish, or creatures living in the sea, taken and caught wholly by the crew of such ship, or by the crew of some other British ship. (§ 48.)

In regard to the coasting trade, the same act enacts, that all trade by sea, from any one part of the United Kingdom to another part thereof, or to the Isle of Man, or from the Isle of Man to any part of the United Kingdom, or from one part of the Isle of Man to another part thereof, is to be deemed to be a coasting trade, and all ships while employed therein are deemed to be coasting vessels. No part of the United Kingdom, or of the Isle of Man, however situated, with regard to any other part thereof, is to be deemed in law, with reference to each other, to be parts beyond the seas, in any matter relating to the trade, or navigation, or revenue, of this country. But all goods, liable to duty of customs, upon the importation or bringing of them into the Isle of Man, when brought from the United Kingdom into that Isle, and all vessels bringing the same, are liable to the same rules and regulations as are required by law, in regard to goods imported into that Isle from foreign parts, and in respect of the vessels importing the same; and all penalties and forfeitures inflicted by law, for breach of the said rules and regulations, attach upon all goods brought into the said Isle, contrary to these or any of them, and upon all persons committing a breach of any such rule or regulation,—these penalties and forfeitures being recoverable, the same as any other penalty or forfeiture under the act.^a

I have already noticed the cargo-book, which the master of every coasting vessel is bound to keep, and the particulars which must be entered in that book; and the same act enacts, that no goods brought coastwise, can be unladen in any port or place in the United Kingdom, or in the Isle of Man, until due notice in writing, signed by the master, has been given to the collector or controller, by the master, owner, wharfinger, or agent of such ship, of the arrival of the ship with goods so brought, nor until the proper documents have been granted, in terms of the act, for the unloading of the goods; and such goods must not be unladen, except at such times and places, in such manner, by such persons,

and under the care of such officers, as directed by the act; and all goods brought to be unladen contrary to the act, are declared to be forfeited.⁹ In this notice, must be stated, the name and tonnage of the ship,—the name of the port to which she belongs,—the name of the master,—the name of the port from which she has arrived,—and the name or description of the wharf or place at which her lading is to be discharged. The notice must be signed by the master, owner, wharfinger, or agent of the ship, and is entered in a book kept by the collector, for the information of all parties interested, and must be delivered within twenty-four hours after arrival, under a penalty of £20, to be paid by the master.¹

Upon the arrival of any coasting ship at any port in Great Britain, from Ireland, and at any port in Ireland, from Great Britain, the master must, within twenty-four hours after arrival, attend and deliver this notice, signed by him, to the collector or controller; and if there be on board any goods subject, on arrival, to any duties of excise, or any goods which had been imported from parts beyond the seas, the particulars of these goods, with the marks and numbers of the packages containing the same, must be set forth in the notice; or, if there be no such goods on board, then it must also be declared in the notice, that no such goods are on board. The master must answer any questions relating to the voyage, as may be demanded of him by the collector or controller; and every master who fails, in due time, to deliver such notice, and truly to answer such questions, forfeits the sum of £100.²

In a previous letter, as to the lading of a coasting cargo, I have explained to you that a cargo-book must be kept, and the particulars which are required by the act to be entered in that book; and, in reference to the discharging of such a cargo, that, in the cargo-book, at the port of discharge, must be noted the respective days upon which any of the goods may be delivered out of the ship, and also the respective times of departure from the port of

9 § 146.

1 § 117.

2 § 118.

lading, and of arrival at any port of unloading. The master must produce this cargo-book, for the inspection of the coastwaiter or other proper officer, so often as the same is demanded, who is at liberty to make any note or remark therein; and, if the master fail correctly to keep the cargo-book, or to produce the same, or if, at any time, there be found *on board* any goods not entered in that book as laden, or any goods noted as delivered, or if it be found that any goods entered as laden, or any goods not noted as delivered, be not on board, the master forfeits £50; and if, at the port of discharge, any package entered in the cargo-book, be found to contain any foreign goods, which are not entered in that book, such goods are forfeited.³

Before any goods can be unladen from a coasting ship, at the port of discharge, the master, owner, wharfinger, or agent of the ship, must deliver the transire to the collector or controller of that port, who, thereupon, grants an order for unloading the ship at the wharf or place mentioned in that order. But, if any of the goods on board be liable to any duty of customs or excise, payable on arrival coastwise, the master, owner, wharfinger, or agent of the ship, or the consignee of these goods, must also deliver to the collector or controller, a bill of the entry of the particulars thereof, expressed in words at length, with a copy thereof, in which all sums and numbers may be expressed in figures, and must pay down all duties of customs, or produce a permit, in respect of all duties of excise, which are due and payable on any of such goods, as the case may be. Thereupon, the collector and controller grant an order for the landing of the goods, in presence, or by the authority, of the coastwaiter.⁴

No goods can be unshipped from any ship arriving coastwise in the United Kingdom, or in the Isle of Man, but only on days not being Sundays or holidays, and in the day time, the same as in the case of ships from parts beyond seas, viz.:—from 1st September to 31st March, between sun-rising and sun-setting; and

3 § 120.

4 § 122.

from 31st March to 1st September, between the hours of seven in the morning and four in the afternoon; nor can goods be so unshipped, unless in presence, or with the authority, of the proper officer of customs, nor unless at places appointed or approved by him.⁵

In the following letter, we shall see the customs' regulations, for the prevention of smuggling.

I am, &c.

LETTER XXII.

Smuggling—evils attending smuggling—certain vessels belonging to British subjects, and foreign vessels within certain distances, with certain goods on board, and goods forfeited—any vessel or boat within port of United Kingdom, &c., having prohibited goods on board, &c., forfeited—if without knowledge of master or owners—precaution in searching crew—cases in which certain vessels not forfeited for having on board tobacco, &c.—goods thrown overboard during chase, forfeited—and persons on board deemed British subjects—certain vessels from which goods thrown overboard, forfeited—vessels when chased, to bring to—not doing so, to be fired at—vessels in port with cargo, afterwards found in ballast, and cargo unaccounted for, forfeited—vessels having secret places for concealing, or devices for running goods, and foreign vessels not square rigged, having secret places for goods, forfeited—goods unshipped without paying duty, and prohibited goods, liable to forfeiture—spirits and tobacco removed without permit, deemed run—restricted goods, deemed run goods—vessels, &c., and goods seized by officers, &c., to be delivered to proper officer—vessels to be searched within certain limits—searching of persons, precautions as to—penalty for misconduct of officers—penalty for denying having foreign goods—officers authorised to search, &c.—commissioners may restore seizures—persons on board vessels liable to forfeiture, procedure against—parties entitled to detain—punishment of persons unshipping or carrying away spirits, &c.—insuring delivery of prohibited or uncustomed goods—aiding or assisting in unshipping spirits, &c., or carrying tea, &c.—punishments for assembling to run goods—making signals—what offences are felonies under the act—power to mitigate penalties—persons detained to be tried—to be imprisoned in default of paying penalty.

GENTLEMEN,

Before closing these letters, I am sorry to say, that I find it necessary to call your special attention to the prevalent crime of smuggling,—to the statutory measures for the prevention of that crime,—and to the statutory punishments and penalties to which the perpetrators of it subject themselves.

I cannot conceive what possible gratification can be afforded by being in possession of a few pounds of

smuggled tobacco or tea, or of a small quantity of seizable spirits. Assuming, that you do succeed in escaping detection, and in evading the vigilance of the customs' officers, yet, the paltry gratification must be short-lived, and cannot repay the solicitude and anxiety necessary to escape detection. But, if smuggled goods are found on board, or in possession of yourself, or any of your crew, then, what are the consequences? Penalties and imprisonments, with hard labour; and, while you are undergoing imprisonment, what is to become of your wife and family? I have known many instances, in which domestic ruin has ensued, and the domestic happiness been irretrievably destroyed, merely because of the husbands suffering punishment for participating in smuggling. And, in any case, there is the infallible consequences of loss of character and situation; for, I should think, no owner would be inclined to take into his employment a master who has been imprisoned for smuggling, nor would a master be disposed to engage, as one of his crew, a seaman just liberated from undergoing imprisonment for the same offence. Besides, your owners are also materially interested in the prevention of smuggling,—as you will afterwards see, that, in most cases, the vessel or boat, in which smuggled articles are found, is subject to forfeiture, and can only be released upon payment of such sum as the commissioners of customs may modify, and, even in the best case, not without trouble and expense.

It seems more than probable, that, in a great majority of the common instances of smuggling, the party doing so has been utterly ignorant of the special punishment he thereby incurs; and, it is in order to show these, that I now proceed to point out the statutory means for checking smuggling, and the penalties and punishments attending it.

By statute, it is enacted, (1)—if any vessel, not being square rigged, or any boat either belonging in whole or in part to her Majesty's subjects, or having half the persons on board, such subjects, be either found or discovered to have been, within one hundred leagues of the coast of the United Kingdom; or (2)—if any vessel

belonging either in whole or in part to her Majesty's subjects, or having half the persons on board, subjects of her Majesty, or if any foreign vessel, not being square rigged, or any foreign boat, in which there is one or more subjects of her Majesty, is found or discovered to have been within four leagues of that part of the United Kingdom, which lies between the North Foreland, on the coast of Kent, and Beachy Head, on the coast of Sussex, or within eight leagues of any other part of the coast; or (3)—if any foreign boat or vessel is found or discovered to have been within one league of the coast of the United Kingdom; or (4)—if any vessel or boat is found or discovered to have been within one league of the Islands of Guernsey, Jersey, Alderney, Sark, or Man, or within any bay, harbour, river, or creek, of or belonging to any one of these islands,—any such vessel or boat, so found or discovered, having on board, or in any manner attached thereto, or conveying or having conveyed in any manner, (1)—any spirits not being in a cask or other vessel, capable of containing 20 gallons at least; or (2)—any tea, exceeding 6 lbs. weight in the whole; or (3)—any tobacco or snuff, not being in a cask or package containing at least 300 lbs. weight of either, or being separated or divided in any manner, within any cask or package; or (4)—any tobacco stalks; or (5)—any cordage or other articles adapted and prepared for slinging or sinking small casks; or (6)—any casks or other vessels whatsoever, of less size or content than 20 gallons, of the description used for smuggling spirits,—then, and in every such case, the spirits, tea, tobacco, or snuff, and tobacco stalks, together with the casks or packages in which they are, and the cordage or other articles, casks, and other vessels, of the description aforesaid, and also the vessel or boat, are forfeited.¹

This enactment applies to smuggling within a certain distance of the coasts; and, it is also enacted, that, if any vessel or boat whatever arrive, or is found or discovered to have been, within any port, harbour, river, or creek of the United Kingdom, or of the Isle of Man, (not being driven in by stress of weather, or other una-

¹ 8 and 9 V., c. 87, § 2.

voidable accident,) and having on board, or in any manner attached thereto, or having had on board and attached thereto, or conveying, or having conveyed in any manner within such port, &c., (1)—any spirits, not being in a cask or other vessel of the size or content above mentioned; or (2)—any tobacco or snuff, not being in a cask or package containing, at least, the weight above mentioned, or separated or divided in any manner therein; or (3)—any tobacco stalks,—then, every such vessel or boat, and the spirits, tobacco, snuff, or tobacco stalks, are forfeited.²

But, if it be made to appear, to the satisfaction of the commissioners of customs, that the spirits, tobacco, snuff, or tobacco stalks, were on board without the knowledge or privity of the owner or master of the vessel or boat, and without any wilful neglect, or want of reasonable care, on the part of them, or either of them, the commissioners can deliver up the vessel or boat to the owner or master thereof.³ This may show you the precaution which you ought to exercise, in searching your crew and their chests, and the forecastle, for smuggled goods; because, if any such are found, the vessel is also liable to forfeiture, and you and your owners must be at the trouble and expense of applying to the commissioners for restitution.

There are certain cases, however, in which vessels are not forfeited for having tobacco, &c., on board. It is enacted, that nothing contained in the act extends to render liable to forfeiture, any vessel of 120 tons burden, or upwards, (1)—on account of any tobacco or snuff coming direct from the East Indies, in packages, each containing 100 lbs. weight of tobacco or snuff, at least,—or, (2)—on account of any cigars, in packages, each containing 100 lbs. at least,—or, (3)—on account of any tobacco, the produce of Mexico, Columbia, the continent of South America, or of the islands of St. Domingo, or Cuba, coming direct from any of these places, or from the warehouse in any British possession in America, in packages, each containing 80 lbs. weight, at least,—or, (4)—on account of any negro-head tobacco, the produce

² § 3.

³ *Ibid.*

of, and coming direct from, the United States of America, in packages containing 150 lbs. weight, at least,—or, (5)—on account of any tobacco of the dominions of the Turkish Empire, which may be separated or divided in any manner within the outward package, it being a hogshead, cask, chest, or case, containing 300 lbs. weight, at least; nor to render any vessel of 60 tons burden, or upwards, liable to forfeiture on account (6)—of any tea,—or, (7)—of any spirits, in glass or stone bottles, not exceeding the size of quart bottles,—such tobacco, snuff, cigars, tea, and spirits being really part of the cargo of the vessel, and included in the manifest, or other papers, enumerating or describing the cargo thereof;—nor to render any vessel liable to forfeiture, on account of any spirits, tea, or tobacco, really intended for the consumption of the seamen and passengers on board, during the voyage, not being more in quantity than is necessary for that purpose;—nor to render any vessel liable to forfeiture, if really bound from one foreign port to another foreign port, and pursuing such voyage, wind and weather permitting.⁴

When any vessel or boat, belonging in whole or in part to her Majesty's subjects, or having one-half of the persons on board subjects of her Majesty, is found within 100 leagues of the coast of the United Kingdom, and does not bring to, upon signal made by any vessel or boat in her Majesty's service, or in the service of the revenue, hoisting the proper pendant and ensign, in order to bring such vessel or boat to, and, thereupon, chase is given,—should any person or persons on board the vessel or boat so chased, or before it brings to, throw overboard any part of the lading, or stave or destroy any part, to prevent seizure thereof,—then, and in such case, the vessel or boat is forfeited; and all persons escaping from such vessels or boats, or from any foreign vessel or boat, during chase made, are deemed and taken to be subjects of her Majesty, unless the contrary be proved.⁵ And every vessel, not being square rigged, and every boat, belonging in whole or in part to her Majesty's subjects, or having on board one or more of her Majesty's subjects, which is found, or discovered to have been, within

four leagues of that part of the United Kingdom, between the North Foreland, on the coast of Kent, and Beachy Head, on the coast of Sussex, or within eight leagues of any other part of the United Kingdom, from which any part of the lading has been thrown overboard, or on board which any of the goods on board are destroyed or staved, to prevent seizure, is forfeited.⁶

In case any vessel or boat, liable to seizure or examination under the law for the prevention of smuggling, does not bring to, when required so to do, on being chased by any vessel or boat in her Majesty's navy, having the pendant and ensign of her Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted,—it is lawful for the captain, master, or other person having the charge or command thereof, (first causing a gun to be fired as a signal,) to fire at or into that vessel or boat; and the act indemnifies the captain, master, or other person acting in his aid or assistance, or by his direction, and discharges him from any indictment, penalty, action, or other proceeding for so doing.⁷ And if any vessel or boat whatever is found within the limits of any port of the United Kingdom, with a cargo on board, and is afterwards found light or in ballast, and the master is unable to give a due account of the port or place, within the United Kingdom, where that vessel or boat has legally discharged her cargo,—that vessel or boat is forfeited.⁸

All vessels or boats, belonging in whole or in part to her Majesty's subjects, having false bulk-heads, false bows, double sides or bottoms, or any secret or disguised place whatsoever, in their construction, adapted for the purpose of concealing goods, or having any hole, pipe, or other device, in or about them, adapted for the purpose of running goods,—are forfeited, with all their guns, furniture, ammunition, tackle, and apparel.⁹

The foregoing enactments apply to the forfeiture of the vessels or boats, in which smuggled goods are or have been; and the following apply to the goods themselves.

If any goods, liable to the payment of any duties, are unshipped from any vessel or boat in the United Kingdom or Isle of Man, (customs or other duties not being paid or secured,) or if any prohibited goods whatsoever are imported or brought into any part of the United Kingdom, or of the Isle of Man,—or if any goods whatever, which have been warehoused or otherwise secured in the United Kingdom, or in the Isle of Man, either for home consumption or exportation, are clandestinely or illegally removed from or out of any warehouse or place of security,—then, and in every such case, all such goods as aforesaid are forfeited, together with all horses and other animals, and all carriages and other things, made use of in the removal of such goods.¹

If any goods, subject to any duty or restriction, in respect of importation, or prohibited to be imported, are found, or discovered to have been, concealed in any manner, on board any vessel or boat, within the limits of any port of the United Kingdom, or of the Isle of Man,—or are found, either before or after landing, to have been concealed in any manner on board that vessel or boat, within such limit as aforesaid, then, and in every such case, all such goods, and all other goods packed with or used in concealing them, are forfeited.² And all spirits and tobacco, for which a permit is by law required, which may be found removing, without a legal permit for the same, are deemed to be spirits or tobacco liable to, and unshipped without, payment of duty, unless the party in whose possession the same is found or seized, prove to the contrary.³

All goods, the importation of which is in any way restricted, which are of a description admissible to duty, and which are found or seized in the United Kingdom, or in the Isle of Man, under any law relating to the customs or excise, are, for the purpose of proceeding for the forfeiture of them, or for any penalty incurred in respect of them, to be deemed to be, and are to be described in any information exhibited on account of such forfeiture or penalty, as goods liable to and unshipped without payment or duties.⁴

¹ § 28.² § 29.³ § 30.⁴ § 31.

All vessels and boats, and all goods whatsoever, liable to forfeiture under any act relating to the customs, can be seized in any place, either upon land or water, by any officer or officers of her Majesty's army, navy, or marines, duly appointed for the prevention of smuggling, and on full pay, or by any officer or officers of customs or excise, or by any person having authority to seize from the commissioners of customs or excise; and all vessels, boats, and goods so seized, must, as soon as convenient, be delivered into the care of the proper officer appointed to receive the same.⁵ And it is lawful to and for any officer or officers of the army, &c., duly authorised, and on full pay, as aforesaid, or for any officer or officers of the customs, producing his or their warrant or deputation, (if required,)—to go on board any vessel, which is within the limits of any of the ports of the United Kingdom, and to rummage and search the cabin and all other parts of the vessel, for prohibited or uncustomed goods, and to remain on board that vessel during the whole time she continues within the limits of such port; and also to search any person or persons, either on board, or who have landed from any vessel, should such officer or officers have good reason to suppose that any uncustomed or prohibited goods are secreted about such person or persons; and if the officer or officers be obstructed in going or remaining on board, or in entering or searching the vessel, every person so obstructing forfeits and loses the sum of £100.⁶

But, before any *person* can be searched by any of these officers, such person can require the officer or officers to take him before a justice of peace, or the collector, controller, or other superior officer of customs, who must determine, whether there is reasonable ground to suppose, that that person has any uncustomed or prohibited goods about his person; and if it appear to the justice, &c., that there is reasonable ground to suppose such person has uncustomed or prohibited goods about his person, then, the justice, &c., can direct that person to be searched in such manner as he may think fit; but, if it appear to the justice, &c., that there is not reason-

able ground to suppose such person has any uncustomed or prohibited goods about his person, then the justice, &c., must forthwith discharge that person, who is not, in such case, liable to be searched. The officers must, on demand, take a suspected person before a justice, &c., detaining him in the meantime; but no female must be searched by any other person than a female, duly authorised for that purpose by the commissioners.⁷ And if an officer does not take the suspected person, with reasonable despatch, before a justice, &c., when so required, or if he require any person to be searched by him, not having reasonable grounds to suppose that such person has any uncustomed or prohibited goods about him, the officer forfeits and pays £10.⁸

Upon any passenger or other person on board a vessel or boat, being questioned by an officer of customs, whether there are any foreign goods upon his person, or in his possession, should he deny the same, and should, after such denial, any such goods be discovered upon his person, or in his possession, the goods so found are forfeited, and the person also forfeits treble the value.⁹ And it is lawful for any officer of customs, or person acting under the direction of the commissioners of customs, having a writ of assistance issued from the Court of Exchequer, to take a peace officer, and, in the day-time, to enter into and search any house, shop, cellar, warehouse, room, or other place, and, in case of resistance, to break open doors, chests, trunks, and other packages, and there seize, and bring from thence, any uncustomed or prohibited goods, and put and secure the same in the custom-house warehouse, next to the place where these goods may be so taken.¹

It is in the power of the commissioners of the treasury, or of the customs, to direct any vessel, boat, goods, or commodities, seized under the customs' acts, or the navigation act, to be delivered to the proprietors thereof, whether condemnation has been made or not, and also to mitigate or remit any penalty or fine, or any part of any penalty or fine, thereby incurred, or to release from confinement any person or persons com-

mitted under the customs' acts, on such terms and conditions as to them may appear proper. But no person is entitled to the benefit of any order for such delivery, mitigation, remission, or release, unless such terms and conditions are fully and effectually complied with.²

Besides these forfeitures of vessels and goods, the individuals concerned are also liable to the following penalties, or subject to the after-mentioned terms of imprisonment, as a punishment for felonies.

For instance, it is enacted, in reference to section 2 of the act, that every person being a subject of her Majesty, (1)—who is found, or discovered to have been, on board any vessel or boat, liable to forfeiture under any customs' act, for being found, or discovered to have been, within any of the before-mentioned distances from the United Kingdom, or from the Isle of Man, having on board, or in any manner attached thereto, or having had on board, or in any manner attached thereto, or conveying or having conveyed in any manner, such goods or things as subject the vessel or boat to forfeiture; or (2)—who is found, or discovered to have been, within any of the aforesaid distances, on board any vessel or boat, from which any part of the cargo or lading thereof has been thrown overboard, or staved, or destroyed to prevent seizure; and (3)—every person, not being a subject of her Majesty, who is found, or discovered to have been, on board any vessel or boat liable to forfeiture for any of the aforesaid causes, within one league of the coast of the United Kingdom, or of the Isle of Man;—that person is, upon being duly convicted of any of these offences before two justices of peace, to be adjudged by the justices as follows:—for the first of these offences, to be imprisoned in a house of correction, and there kept at hard labour, for any term, not less than six, nor greater than nine, calendar months:—for the second of these offences, for any term not less than nine, nor greater than twelve, calendar months,—and for the third or any subsequent offence, twelve calendar months.³

Any officer or officers of the army, navy, or marines, duly employed for the prevention of smuggling, and on

² § 45.

³ § 50.

full pay, or any officer or officers of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, are specially authorised and empowered to detain every such person, and to take him before a justice of the peace, in the United Kingdom, or in the Isle of Man, to be dealt with as directed by the act. But if any person proves, to the satisfaction of the justice or justices before whom he is brought, that he was only a passenger in the vessel or boat, and had no interest whatever therein, or in the cargo, or any goods on board thereof, he must be forthwith discharged by the justice or justices.⁴

Every person (1)—who is found, or discovered to have been, on board any vessel or boat, liable to forfeiture under any customs' act, for being found, or discovered to have been, within any port, harbour, river, or creek, of the United Kingdom or Isle of Man, not being driven thereunto by stress of weather or other unavoidable accident,—having on board, or in any manner attached thereto, or having *had* on board, or in any manner attached, or conveying, or having conveyed in any manner, such goods or things as subject the vessel or boat to forfeiture,—or (2)—who is found, or discovered to have been on board any of her Majesty's vessels, or in her Majesty's employment or service, or on board of any foreign post-office packet, being a national vessel employed in carrying the mails between any foreign country and the United Kingdom, (these last-mentioned vessels or packets being found or discovered to have been within any port, &c., of the United Kingdom or Isle of Man, and not driven in by stress of weather or other unavoidable accident,) having on board, or in any manner attached, or having had on board, or in any manner attached, or conveying, or having conveyed in any manner, any spirits, not being in a cask or vessel capable of containing the size or content of 20 gallons at least; or any tobacco or snuff, not being in a cask or package containing 300 lbs. weight at least; or being separated or divided in any manner within any cask or package,—such person forfeits £100;—and the officers and other persons before

⁴ § 50.

named, can detain such person, and take him before a justice of the peace, to be dealt with in terms of the act.⁵ But no person is liable to any penalty, or to be detained on account of any offence as now mentioned, unless there is reasonable ground to believe that he was the owner of the goods, or was concerned in bringing them into the ports or other places as are before mentioned, or in concealing the same; nor on account of any spirits, tobacco, or snuff being stores, or being in vessels or packages of a content or size permitted by law.⁶

Every person who unships or assists, or is otherwise concerned in unshipping, any goods prohibited to be imported into the United Kingdom or Isle of Man, or the duties for which have not been paid or secured,—or who knowingly harbours, keeps, or conceals, or knowingly permits or suffers to be harboured, kept, or concealed, any goods which have been illegally unshipped, without payment of duties, or which have been illegally removed, without payment of the same, from any warehouse or place of security where they may have been deposited,—or any goods prohibited to be imported, or to be used or consumed in the United Kingdom or the Isle of Man,—and every person, either in the United Kingdom or Isle of Man, to whose hands and possession any such prohibited or uncustomed goods knowingly comes, or who assists or is in anywise concerned in the illegal removing of any goods from any warehouse or place of security in which they have been deposited,—that person forfeits, either three times the value of the goods, or the penalty of £100, at the election of the commissioners of customs.⁷

Every person who, by way of insurance or otherwise, undertakes or agrees to deliver any goods, to be imported from parts beyond the seas, into any port or place in the United Kingdom, without paying the duties due thereon on such importation, or any prohibited goods,—or who, in pursuance of such insurance or otherwise, delivers, or causes to be delivered, any prohibited or uncustomed goods,—and every aider or abettor of such person,—for every such offence, forfeits the sum of £500, over and

5 § 53.

6 § 54.

7 § 46.

above any other penalty to which, by law, he may be liable; and every person who agrees to pay any money for the insurance or conveying of such goods, or receives, or takes these into his custody or possession, or suffers the same to be so received or taken, also forfeits £500, over and above any penalty to which, by law, he may be liable, on account of such goods;⁸ and if any person offers for sale any goods, under pretence that the same are prohibited, or have been unshipped and run on shore without payment of duties, then, and in such case, all these goods (although not liable to any duties or prohibited) are forfeited, and the person offering the same for sale, forfeits either the treble value of the goods, or the sum of £100, at the election of the commissioners of customs.⁹

Every person who unships, or is aiding, assisting, or concerned in unshipping, any spirits or tobacco liable to forfeiture, under any customs' or excise act, either in the United Kingdom, or in the Isle of Man, or who carries, conveys, or conceals, or is aiding, assisting, or concerned in carrying, conveying, or concealing any such spirits or tobacco, forfeits £100; and he can be detained by any officer of the army, navy, or marines, duly employed for the prevention of smuggling, and on full pay, or by any officer of customs or excise, or other person acting in his aid or assistance, or duly employed in the prevention of smuggling, and taken before any justice of peace, to be dealt with as the act directs.¹ And every person unshipping, or aiding, assisting, or otherwise concerned in the unshipping, of any tea or foreign manufactured silk, of the value of £20, liable to forfeiture under any customs' or excise act, or who carries, conveys, or conceals, or is aiding, assisting, or concerned in carrying, conveying, or concealing such tea or silk,—forfeits for every such offence, treble the value thereof; and such person can be detained and dealt with in the same way as already mentioned,—only the person so detained can give security in treble the amount of the goods seized, to the satisfaction of the justice, to appear at a time and place to be appointed by him.²

Every person, who procures, or hires by any means, or deposes, or authorises any other to procure or hire any persons to assemble for the purpose of being concerned in the landing or unshipping, or carrying, conveying, or concealing any goods prohibited to be imported, or the duties for which have not been paid or secured,—and (2) every person who obstructs any of the aforesaid officers or other persons in the execution of their duty, or in the due seizure of any goods liable to forfeiture by any customs' act,—or (3) who rescues or causes to be rescued any goods which have been duly seized,—or (4) who attempts, or endeavours to do, or who does, either before, at, or after seizure, stave, break, or otherwise destroy any goods to prevent the seizure thereof, or the securing of the same,—that person, upon being duly convicted of any of these offences, before the justices of the peace, is adjudged by the justices, *for the first offence*, to be imprisoned in a house of correction, and kept to hard labour, for not less than six, nor greater than nine, calendar months,—*for the second offence*, for not less than nine, and not greater than twelve, calendar months,—and *for the third or any subsequent offence*, for twelve calendar months.⁶

To prevent signals made to or by any smuggling vessel or boat, it is enacted, that, after sunset and before sunrise, between 21st September and 1st April, or after eight in the evening and before six in the morning, at any other time of the year, no person must make, aid, or assist in making, any signal in or on board, or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of that coast or shore, for the purpose of giving notice to any person on board any smuggling vessel or boat, whether any person so on board, be or be not within distance to notice any such signal; and if, contrary to the true intent and meaning of the act, any person makes or causes to be made, or aids, or assists in making any such signal, the person so offending is guilty of a misdemeanor; and it is lawful for any person to stop, arrest, and detain the person or persons who so offend,

and carry or convey them before any one or more of the justices of the peace, residing near the place where the offence is committed, who, if he see cause, can commit the offender to the next county gaol, there to remain until liberated in due course of law. In any indictment or information, it is not necessary to prove that any vessel or boat was actually on the coast; and, on conviction, the offender either forfeits and pays the penalty or forfeiture of £100, or, at the discretion of the court, can be sentenced or committed to the common gaol or house of correction, to be kept to hard labour, for any term not exceeding one year.⁷

Certain offences are declared, by the act, to be felonies, and are punishable as such:—as, for instance, three or more persons, armed and assembled for the purpose of illegally landing or running prohibited or smuggled goods; maliciously shooting at any vessel or boat belonging to the royal navy, or in the service of the revenue, within 100 leagues of any part of the coast of the United Kingdom; maliciously shooting at, or maiming, or dangerously wounding, any officer of the army, &c., duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or any one acting in his aid or assistance, duly employed for the prevention of smuggling, in the due execution of his office or duty,—for each of these felonies, the party convicted is liable to be transported beyond seas, for the period of his natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.⁸ And if any person assault, resist, or oppose, molest, hinder, or obstruct, by force or violence, any of the aforesaid officers or persons, in the due execution of his or their office or duty, such person is, on conviction, to be transported for seven years, or to be imprisoned and kept at hard labour, for any term not exceeding three years, at the discretion of the court before whom the offender is convicted.⁹

It very generally happens, that prosecutions for breach of the customs' laws are brought before the justices of the peace; and when any person is convicted before any

two or more of them, in any penalty or penalties incurred under the act, except as after mentioned, the justices have power, in cases where, upon consideration of the circumstances, they deem it expedient so to do, and, for a first offence only, to mitigate the penalty or penalties, so as the sum to be paid may not be less than one-fourth of the penalty in which he has been convicted.¹ And, where a person has been so committed to prison for non-payment of a penalty, less than £100, the gaoler or keeper is authorised and required to discharge him at the end of six calendar months, from the commencement of his imprisonment.²

When any person, liable to be detained, and who has been detained, for any offence against the smuggling act, or any act relating to the customs, is brought before any one or more justices of the peace, they can convict such person, either on his own confession, or upon proof thereof, by one or more credible witness or witnesses; and every person so convicted must immediately, upon such conviction, pay into the hands of the justices, for the use of her Majesty, the penalty of £100, without any mitigation whatever, or in default thereof, the justices must, by warrant under their hand and seals, commit the person so convicted, and, making such default, to any gaol or prison, there to remain until the penalty is paid. And, when any person is convicted of an offence, for which the punishment of hard labour is inflicted, the justices can commit such person to the next house of correction, there to be kept to hard labour, for such time as they are authorised to do, by the smuggling act, or any other act or acts relating to the customs.³

In all cases, where a person has been convicted before any two justices of the peace, for any offence, for which a penalty is inflicted by the smuggling act, or any other act or acts relating to the customs, the justices, if they think fit, can order and adjudge, that that person shall, in default of paying the penalty, be imprisoned,—for the first of these offences,—for a period of not less than six, nor more than nine calendar months,—and, if he has been before convicted of any such offence, to hard

1 § 86.

2 § 87.

3 § 88.

4 § 89.

labour, for any period not less than six, nor more than twelve months.⁴

I have thus shown you, what are the statutory regulations against smuggling, and the punishments for so doing: and I should conceive, that these were quite enough to deter you, for the sake of yourself and your owners, from being guilty of any such practices, as well as to make you use every possible means, to prevent any of your crew from being guilty of the same.

I am, &c.

LETTER XXIII.

Earning of wages—general rule—exceptions—cases of wreck or loss—seaman disabled—vessel seized for debt, &c.—in seeking ship—in trading voyages—seamen bound to do utmost in service of ship—promising extra sum—in illegal voyages—in case of shipwreck—seamen entitled to wages only—when this privilege forfeited—times for payment of wages—forfeiture for leaving without previous discharge—not if seamen compelled to leave—times for paying wages in home and foreign trade—when seaman cannot sue abroad for wages—exceptions—when compensation recoverable, in addition to wages—sums to be paid to seaman on discharge—account required by Mercantile Marine Act—deductions to be made—allowance for short provisions—but none when reduction by way of punishment—no bill of sale, assignment, or attachment of wages, valid—certificate of discharge to be given—decisions by shipping master of disputes between parties—mutual release to be signed on discharge and settlement before him—effects of—when discharge and settlement required before shipping master, no payment, &c., made otherwise, evidence of release—statement of whole sums paid before shipping master, to be made and signed by him—report by master, as to conduct, &c., of crew—if required, copy to be given to each seaman—production of log-books, &c., to shipping master—penalties—immediate payment of wages—three-fold remedy for payment—preference over ship and freight—personal claim against master—personal claim against owners—no preference over cargo—summary mode of recovering wages—form of procedure and recovery—if agreement not produced, seaman does not lose remedies—seaman dying on board, payment and disposal of wages—deposit of money, clothes, &c.—penalty for failure—disposal of register ticket—seaman dying abroad—elsewhere than on board—consul takes charge of money and effects—remits balance, with full account, to president and governors—when seamen dying, leaves money and effects on board his ship—ship sold, &c., at any port out of her Majesty's dominions—payment of wages—provision for employment of seamen, or sending them back—entries of illness, &c., in official log-book—and of seamen leaving ship—loss of wages—by loss of ship—when seamen entitled to proportion of—provision of Merchant Seamen's Act, in case of loss or wreck—by capture—in case of embargo—absolute desertion—provisions of Merchant Seamen's Act as to—neglect of duty, &c.—when forfeits wages—exceptions—deductions and abatements—for merchant seamen's fund—under Merchant Seamen's Act—expenses incurred—seaman refusing to join—neglect of duty—quitting ship after arrival—what forfeiture incurred—how forfeitures to be ascertained—entries of fines and punishments—to be made and attested in log-book—evidence of—fines to be deducted from wages, and paid shipping master—deductions made on master's account.

GENTLEMEN,

The next subject which requires your attention is, the earning of wages by the seamen. The general rule is, that freight is the mother of wages; and, if no freight be earned, from a cause not arising from the illegal act; fraud, or misconduct of the master or owners, in interrupting or destroying the voyage, no wages will be due; and, therefore, if the vessel be lost, or the voyage rendered unproductive by a peril of the sea, the seamen must lose their wages,¹ unless, in cases of wreck or loss, where the surviving seamen produce a certificate from the master or chief surviving officer, that they had exerted themselves to the utmost, to save the ship, cargo, and stores, in which case, every surviving seaman, producing this certificate, is entitled to his wages up to the period of the wreck or loss.² But where the seaman is disabled in the course of the voyage, by accident or sickness, he is entitled to his full wages; nor will the master, by improperly discharging a seaman, deprive him of full wages, on the prosperous termination of the voyage.³

If the vessel is seized for a debt of the owners, or for having contraband goods on board, or for any other unlawful act of the master or owners, the seamen are, notwithstanding, entitled to their wages; and where the voyage is obliged to be discontinued, in consequence of the unseaworthiness of the ship, the seamen are entitled to compensation in damages, for the loss of their wages.⁴ Where also a vessel is sent out in ballast, as a seeking ship, in the expectation of obtaining a freight, but returns home disappointed, the seamen will be entitled to their wages, both on the outward and homeward voyages, or although the vessel be lost in ballast, and no freight whatever earned.⁵

In trading voyages, where cargoes are successively taken in and delivered at different ports, and the freight for these cargoes is earned by the owners, the sailors are entitled to their wages up to the time of the vessel's

¹ Abbot, 638; Holt, 272.

² 7 and 8 V., c. 112, § 17.

³ *Robinet v. ship Exeter*; 2 Rob. 261.

⁴ Abbot, 639; 3 Kent, 187.

⁵ Lord Stowell, in the *Neptune*, 17th February, 1824; 1 Hag. 233.

arrival at each port of delivery; and this claim of the seamen for their wages, will not be defeated by a clause in the articles, that the wages are not to be paid until the vessel's arrival at the last port of discharge, although the vessel should be lost in the last part of the divided voyage.⁶

As every seaman whom you engage is bound, by his contract, to do his utmost in the service of the ship to which he is engaged, so you and the owners are entitled to the whole of their labour and services, whether mates or mariners. Their general engagement is, to do all in their power for the good of the service in which they are engaged, and to exert themselves to the utmost to bring the vessel to her destined port, under every difficulty, and in every emergency; and, therefore, though you make a promise to your seamen, when the vessel is in distress, to give them an additional sum, as compensation, over and above their wages, if they would exert themselves for the common safety,—such promise is not good, and they can recover nothing under it.⁷ If the voyage be illegal, or in contravention of any act of parliament, or, if the contract has proceeded from a bad cause,—as engaging in the slave trade,—the seamen have no claim for wages.⁸ By their engagement, the seamen are bound to navigate the vessel, in fair weather and in foul; and should the vessel be shipwrecked, they are bound to exert themselves to the utmost, to save as much as possible of the ship, cargo, and stores. Should the cargo be saved, and part of the freight earned, it is just that the seamen should also be entitled to a proportional part of their wages. And, if no part of the cargo be saved, but, by the laborious exertions of the seamen, parts of the wreck of a stranded vessel are saved, more than sufficient to pay their wages, they, not having departed from the wreck until dismissed by the master, are entitled to compensation in satisfaction of the wages, already earned by past services and perils.⁹ To use the emphatic language of a late learned judge, “a seaman

6 *Juliana, Ogilvie*, 19th March, 1822; 2 Dod. 504.

7 *Stilk v. Myrick*; 2 Camp. 317.

8 *The Vanguard*, 22nd Nov., 1805; 6 Rob. 207.

9 *The Neptune*, 17th Feb., 1824; 1 Hag. 237.

has a right to cling to the last plank of his ship, in satisfaction of his wages, or part of them."¹ But the crew are not to be considered as salvors; and they are not to be rewarded for their labours and exertions in saving parts of the cargo and vessel, according to the extent of these. For their exertions in protecting the ship and cargo, they are to be compensated by payment of their wages, to the extent of which their entire possible service for this purpose is pledged;² but if, as is too often the case, the seamen abandon the wreck as hopeless, without any intention to take possession of it, and save as much as they can,—by doing so, the contract between you and them is at an end, and they lose their lien, or privilege, or claim, for any wages.³

These general principles may enable you to settle with your seamen, wherever you may be. In coasting voyages, the wages must be paid within two days "after the termination of the agreement," or at the time when the seamen are discharged; and in voyages otherwise than coastwise, within three days after the cargo has been delivered, or within seven days after the seamen's discharge.⁴

By section 7 of the Merchant Seamen's Act, it is enacted, that if any seaman quit the ship, after arrival at the port of delivery, and before her cargo be discharged, without a previous discharge or leave from the master, he forfeits one month's pay out of his wages; and, therefore, it may be held to be the intention of the act, to make the seamen's engagement continue until the delivery of the cargo, attending which there is often a great deal of hazard; and, until the cargo be *actually* delivered, it is, in the strictest manner, the duty of the seamen to remain with the vessel.⁵ If, however, a seaman is compelled, either during the course of the voyage, or before delivery of the cargo, after the ship's arrival, to leave the vessel, in consequence of a want of sufficient provisions, this will be a sufficient justification, and he will be entitled to his wages; or if, during the

1 Per Lord Stowell, in the *Sydney Cove*, 6th May, 1815; 2 Dod. 13.

2 Lord Stowell, in the *Neptune*, *ut sup.*

3 3 Kent, 195.

4 7 and 8 V., c. 112, § 11.

5 M'Donald v. Jopling, 5th June, 1838; 4 M. W. 285.

course of the voyage, you wrongfully discharge a seaman, he will, notwithstanding, be entitled to his full wages upon the prosperous termination of the voyage, under deduction, of course, of any wages he may, in the interim, have earned in any other employment.⁶

By the same act, the seamen's wages must be paid,—in vessels trading coastwise, or in the home trade, within two days after the termination of the agreement, or at the time when a seaman is discharged, whichever first happens,—and, in vessels trading otherwise than coastwise, or in the home trade, at latest, within three days after the cargo has been delivered, or within seven days after the seaman's discharge, whichever first happens.⁷ By the Mercantile Marine Act, it is enacted, that no seaman who is engaged for a voyage, or an engagement to terminate in the United Kingdom, is entitled to sue abroad for wages, in any court, or before any justice, unless he is discharged in the manner required by the General Merchant Seamen's Act, and with the written consent of the master, or proves such ill usage on the part of the master, or by his authority, as to warrant reasonable apprehension of danger to the seaman's life, by remaining on board; but if any seaman, on his return to the United Kingdom, proves that the master or owner has been guilty of any conduct or default, which, but for this section of the statute, would have entitled the seaman to sue for wages before the termination of the voyage or engagement,—he is entitled, in such case, to recover, in addition to his wages, such compensation, not exceeding £20, as the court or justice hearing the case may think reasonable.⁸

In all cases, a seaman is entitled, at the time of his discharge, to be paid on account, a sum equal to one-fourth part of the balance due to him; and, in case the master or owner neglect or refuse to make this payment, he forfeits and pays to each such seaman, the amount of two days' pay, recoverable as wages, for each day, not exceeding ten, during which payment is, without sufficient cause, delayed beyond the periods already mentioned.⁹

⁶ Abbot, 620.

⁸ § 94.

⁷ 7 and 8 V., c. 112, § 11.

⁹ § 11.

And, by the Mercantile Marine Act, it is enacted, that, except in cases in which the seamen expressly require to be paid, without waiting for an account, the master must, not less than twenty-four hours before paying off or discharging a seaman, deliver to him, or, if the seaman is to be discharged before a shipping master, then to the shipping master, a full account, in the form sanctioned by the board, of his wages, and of all the deductions to be made therefrom, on any account whatever; and no such deduction can be allowed, unless a statement thereof is so made and delivered, excepting cases where the seamen require to be paid without waiting for an account, and except in respect of any matter happening after the delivery of the account, as now mentioned.¹

In addition to the wages, it is enacted by the Merchant Seamen's Act, that, if, during the voyage, the allowance of provisions, which a seaman had agreed to receive, be reduced one-third of the quantity, or less, he is to receive fourpence per day, and, if the reduction be more than one-third, he is to receive eightpence per day, during the period these deductions may be made,—and this pecuniary allowance is to be paid, in addition to, and to be recoverable, as wages.² But no seaman or apprentice is entitled to any pecuniary allowance, on account of any reduction in the quantity of provisions furnished to him, during such time as he wilfully, and without sufficient cause, refuses or neglects to perform his duty, or is lawfully under confinement for misconduct, either on board or on shore, or during the time that such quantity may be reduced, in accordance with any regulation for reduction, by way of punishment, contained in the agreement.³ And, by the same section of the Merchant Seamen's Act, it is declared, that every payment of wages to a seaman is valid and effectual in law, notwithstanding any bill of sale or assignment, which may have been made of such wages, or of any attachment or incumbrance thereon; and no assignment, or sale of wages, or salvage, made prior to the accruing thereof, nor any power of attorney expressed to be irrevocable for the receipt of any such wages or salvage, is valid or binding upon the

¹ § 95.² § 12.³ 13 and 14 V., c. 93, § 81.

party making the same, and no attachment issued by any court, can prevent the payment of wages to the seaman.⁴

By the Merchant Seamen's Act, upon the discharge of a seaman from his ship, or upon payment of the wages to him, he must receive from the master, not only his register ticket, (so long as such may be in use,) but also a certificate of the seaman's service and discharge, in the form of schedule E, annexed to the act, which certificate must be signed by the master; and, if he does not give such certificate, he forfeits and pays to such seaman the sum of £5.⁵ And, by the Mercantile Marine Act, all seamen of foreign-going ships, discharged in the United Kingdom, must be discharged, and receive their wages, in the presence of a shipping master,⁶ who can hear and decide any question whatever, between the master or owner and any of his crew, which both parties agree, in writing, to submit to him, and his decision thereon is binding on both parties, and, in any legal proceeding in the matter, before any court or justice, shall be deemed to be conclusive as to the rights of the parties. This written submission, though unstamped, signed by the parties, with an unstamped certificate, signed by the shipping master, is sufficient evidence that the same has been duly made.⁷

Upon the completion before a shipping master, of any discharge and settlement, the master or owner and each seaman must, respectively, in presence of the shipping master, sign a mutual release of all claims in respect of the last voyage or engagement, in the form sanctioned by the Board of Trade, and the shipping master also signs and attests it, and retains and transmits it as directed by the act; and this release, so signed and attested, operates as a mutual discharge and settlement of all demands between the parties thereto, in respect of the past voyage or engagement; and a copy of this release, certified under the hand of the shipping master, to be a true copy, must be given by him to any person who is the party thereto, and who requires the same;—and this copy is receivable in evidence upon any future ques-

⁴ 7 and 8 V., c. 112, § 12.

⁵ § 13.

⁶ § 96.

⁷ § 97.

tion, touching all such claims, and has all the effect of the original of which it purports to be a copy. In cases in which discharge and settlement before a shipping master are required, no payment, receipt, settlement, or discharge otherwise made, can operate or be admitted as evidence of the release or satisfaction of any claim; and, upon any payment being made by a master, before a shipping master, the shipping master must, if required, sign and give to the master, a statement of the whole amount so paid; and this statement, as between the master and his employer, is received as evidence that he has made the payments therein.⁸

Upon any discharge being effected before a shipping master, every master must make and sign in duplicate, in the form sanctioned by the Board of Trade, a report of the conduct, character, and qualifications of the persons discharged, or can state, in the column left for that purpose in the form, that he declines to give any opinion thereupon; and the shipping master retains one copy, and transmits the other to the registrar of seamen, or to such other person as the board may direct, to be recorded, and must, if desired so to do by any seaman, give to him, or indorse on his certificate of discharge, a copy of so much of this report as concerns him.⁹ In any proceeding relating to the wages, claims, or discharge of any seaman, directed by the act to be carried on before a shipping master, he can call upon the owner or his agent, or upon the master, or any mate, or other member of the crew, to produce any log-books, papers, or other documents, in his possession or power, relating to any matter in question in that proceeding, and can call before him, and examine any of these persons, being then at or near the place, on any such matter.¹

For the not-observance of these regulations of the Mercantile Marine Act, the following penalties and punishments are imposed,—(1) in any case in which discharge and settlement for wages are directed by the act, to be made before a shipping master, the master or owner who discharges any seaman, or settles with him for his wages, otherwise than is directed by the act, for

each offence, he is liable to a penalty not exceeding £10;—(2) a master who fails to deliver the account, as required by section 95, at the time and in the manner directed by that section, is liable, for each offence, to a penalty not exceeding £5;—(3) every owner, agent, master, mate, or other member of the crew, who, when called upon by the shipping master, does not produce any paper or document as before mentioned, if in his possession or power, or does not appear and give evidence, and does not show some reasonable excuse for his default, he is liable, for each offence, to a penalty not exceeding £5;—and, (4) every person who makes, or procures to be made, or assists in making, any false certificate or report of the service, qualifications, conduct, or character of any seaman, knowing the same to be false,—or who fraudulently forges or alters, or procures to be forged or altered, or assists in forging or altering, any such certificate or report,—or who fraudulently makes use of any certificate or report which is forged or altered, or does not belong to him,—he, for each offence, is either to be guilty of a misdemeanor, or to be liable, summarily, to a penalty not exceeding £50, or to imprisonment, not exceeding three months, with or without hard labour, as the court or justice hearing the case may think fit.²

The Merchant Seamen's Act enacts, that, if three days after the termination of the stipulated service, or after a seaman has been discharged, he is desirous of proceeding on another voyage, and, in order thereto, or for any other sufficient reason, he requires immediate payment of any amount of wages, not exceeding £20, due to him, he can make application to a justice of the peace, who, on satisfactory proof that the seaman would be prevented from employment, or incur serious loss, or inconvenience by delay, can summon the party or parties liable before him, and, if it appear to the satisfaction of the justice, that there is no reasonable cause for delay, he can order payment to be made forthwith, and, in default of immediate compliance with that order, the sum of £5 is forfeited, and must be paid to the seaman, in addition to his wages.³

² § 101.

³ § 14.

For payment of their wages, the seamen have a three-fold remedy:—they have a preference over the ship and freight;—a personal claim against you, as master;—or they have a like personal claim against the owners. In proceeding against the ship, the vessel can be arrested at the instance of the seamen, and brought to a judicial sale; and, in such case, the wages have a preference on the price before bottomry bonds, hypothecations, or mortgages,⁴ or other claims. The right over the freight is, that they have an implied preference over it for their wages, so long as it has not been paid; and, therefore, in any action as to payment of that freight, the seamen are entitled to a preference for the wages of the voyage; but this is a right which is seldom, if ever, exercised.⁵ The seamen have no lien or preference on the cargo, for any wages that may be due them.⁶

The most common mode of proceeding to recover wages, is by personal action against the master or owner, or party or parties liable, although it is to be expected that, under the provisions of the Mercantile Marine Act, it will be rare such an action will have to be resorted to. A summary mode of proceeding is authorised by section 15 of the Merchant Seamen's Act, where the wages do not exceed £20. Any seaman may present a short petition upon oath, to a justice of the peace, where, or near to the place where, the ship ends her voyage, clears at the custom-house, or discharges her cargo; or where or near to the place where the party, or either of the parties, upon whom the claim is made, shall be or reside; and, upon that petition, the justice grants warrant for summoning the master or owner to appear before him, and answer the complaint;—on the appearance of the party or parties, or, failing to do so, on due proof being made of his or their having been summoned, which is proved, of course, by the execution of the officer, the justice can examine the parties themselves and their witnesses, upon oath, as to the complaint, and the amount of wages that may be due, and he can inspect the agreement or articles, and make such order for payment of the amount, with

⁴ The Maddona, D'Itra, Papaghica, 30th April, 1811; 1 Dod. 37. The Sydney Cove, 6th May, 1815; 2 Dod. 13.

⁵ Abbot, 662. ⁶ Lady Durham, Stewart, 18th March, 1835; 3 Hag. 196.

the costs incurred, as may appear to him to be reasonable and just. Should the amount not be paid within two days from the date of that order, the justice can then issue a warrant for recovering the amount of wages found due, by distress and sale of the goods and moveables of the party upon whom the order for payment is made, including the costs, charges, and expenses of the complaint, and of the distress and levy; or the justice can cause the amount of the wages, costs, charges, and expenses, to be levied upon the ship, or tackle and apparel; and, if the ship is not within the jurisdiction of the justice, or the levy cannot be made, or should prove insufficient, he can then cause the party upon whom the order has been made, to be apprehended and committed to gaol, there to remain without bail, until payment of the amount of the wages, and of all costs and expenses attending the recovery of the same. The award and decision of the justice is final and conclusive upon all parties;⁷ and in any such action, it is not incumbent on the seaman to produce the articles of agreement, or certified copy thereof, or to give notice for their production; but, if the agreement is not produced and proved, he is at liberty to prove the contents and purport thereof, or to establish his claim by other evidence, according to the nature of the case; nor by signing these articles, does he lose his lien upon the ship, or is he deprived of any remedy for the recovery of his wages, to which he would otherwise be entitled.⁸

If a seaman dies on board a ship during a voyage, all sums then due to him for wages, must, within three months after the arrival of the ship at any port in Great Britain or Ireland, be paid to the trustees appointed at that port, under the Merchant Seamen's Fund Act, or to the receiver, collector, or other authorised agent of the president and governors under that act, for the use of the executor of the seaman so dying; and, if no claim be made by the executor on the trustees, on account of these wages, within one year after they have been so paid over, then the trustees, to whom the wages have

⁷ 7 and 8 V., c. 112, § 15.

⁸ 7 and 8 V., c. 112, § 5; 13 and 14 V., c. 93, § 52, 53.

been paid, remit the same to the collector or receiver, or other authorised agent of the president and governors, at the port of London, in such manner, and at such time, as the president and governors may direct, for the use of such executor; and, should no claim be made by the executor, upon the president and governors, on account of such wages, within one year after these have been paid over to their collector, receiver, or agent, then the president or governors can direct the wages, without interest, to be paid over to the widow, or, if there be no widow claiming, to the lawful issue respectively, or to such other persons as are legally entitled to receive the same. At the same time, he must also deposit any money, clothes, or effects left by the seaman on board, or the proceeds thereof, and transmit a full account of these effects, and of the wages, to the president and governors; and for every failure, the master forfeits a sum not exceeding £50, in addition to being accountable for the mariner's clothes, effects, and wages.⁹ In such case, also, the master must, on the vessel's return, deliver up the seaman's register ticket to the president and governors, who transmit the same to the registrar; and in case the ticket is retained for more than twenty days after the death of the seaman, or ten days after the vessel's arrival in this kingdom, should the seaman die abroad, the person so retaining is liable to a penalty not exceeding £5.¹

In like manner, when a seaman dies abroad, elsewhere than on board the ship, and leaves money and effects not on board the ship, the consul or vice-consul, at or nearest to the place, claims and takes charge of all his money and effects, or disposes of the effects, if he thinks fit; and, after deducting the expenses, remits the balance, with a full account of the money and effects, to the president and governors, to be paid over and disposed of by them, the same as in the former case. And when the seaman so dying, leaves any money, clothes, or effects on board his ship, the master must deposit the same, or the proceeds thereof, with the pre-

⁹ 4 and 5 W. 4th, c. 52 § 28.
¹ 7 and 8 V., c. 112, § 31.

sident and governors, to be disposed of by them, in the same manner, and under the like penalty, as in the other case.²

Should the ship be sold, transferred, or disposed of, at any port out of her Majesty's dominions, the master must pay the wages to which, by the agreement, the seamen are entitled; and, unless where the crew signify their consent in writing, in presence of the British consul or vice-consul, or, if there be none such, in presence of one or more British resident merchants at that port, to complete the voyage, if continued, the master must, either provide them with adequate employment on board some other homeward-bound British ship, or furnish the means of sending them back to the port at which they had been originally shipped, or to some other port in the United Kingdom, as may be agreed on; or provide them with a passage home; or deposit with the consul or vice-consul, or merchants, a sum of money deemed sufficient to defray the expenses of their subsistence and passage. Should the master refuse or neglect to do so, these expenses, when defrayed, are a charge upon the owner, except in cases of barratry, and may be recovered against him, as money paid to his use. And the master must give to each of the crew, and to each seaman whose services so terminate, his register ticket, and a certificate of discharge, in the usual form.³

By the Mercantile Marine Act, it is enacted, that, in every case of illness or injury causing a suspension of work, or of death, happening to any seaman or apprentice during the voyage, the master must cause an entry thereof, and also, in the case of illness or injury, of the nature thereof, and of the medical treatment adopted, and, in the case of death, of the cause of death, to be made in the official log-book. This entry is to be signed by the mate, or if there is no mate, by the carpenter, boatswain, or one of the oldest members of the crew, and by the surgeon or medical man on board, if any; and, in case of any seaman or apprentice ceasing to be a member of the crew, otherwise than by death on board, the master must immediately cause an entry of the place,

² 7 and 8 V., c. 112, § 31.

³ § 17.

time, manner, and cause of that seaman or apprentice ceasing to be a member of the crew, to be made in the official log-book, and that entry must be signed in the same manner, as now directed.⁴

I now proceed to those cases in which the seamen lose their whole wages; and this loss may occur, either where there is no blame attributable to them, or in consequence of their own misconduct.

It is the general rule, that if, in the course of the voyage, the ship be lost, there is also a loss of wages; but, as already observed, if the vessel be wrecked and the crew assist in saving as much of the wreck as will pay their wages, they are entitled to payment from the proceeds;⁵ and if the cargo be saved, and a proportion of the freight paid, the seamen are also entitled to a proportional part of their wages.⁶ When the voyage is an outward and homeward voyage, and part of the outward freight has been paid or advanced, the seamen will be entitled to a corresponding part of their wages, unless the articles specify the two as one voyage only; and where this voyage is a trading voyage, consisting of several parts successively, for each of which separate freight is earned, wages will be due for the parts performed, although the vessel be afterwards lost.⁷ And, by the Merchant Seamen's Act, in all cases of wreck, or loss of the ship, every surviving seaman is entitled to his wages, up to the period of the loss or wreck, provided he produce a certificate from the master, or chief surviving officer, that he had exerted himself to the utmost to save the ship, cargo, and stores.⁸

Capture, also, operates as extinguishing the seaman's claim for wages; but his claim revives on recapture, provided the seaman has not been separated from the vessel, and is on board at the time of recapture.⁹ But an embargo has not the same effect; and, although the ship be detained, and the seamen made prisoners of war, if they are afterwards liberated, and rejoin their ships, the seamen are entitled to their wages, during the whole

⁴ § 87. ⁵ Abbot, 632; Holt, 271. ⁶ 3 Kent, 192; Abbot, 631.

⁷ Abbot, 625; 3 Kent, 191. ⁸ 7 and 8 V., c. 112, § 17.

⁹ The Friends, Bell, 11th Dec., 1801; 4 Rob. 143.

time, until arrival at the port of discharge, and the final termination of the voyage there.¹

Absolute desertion, or desertion from the ship, without any just cause for so doing, and without any intention of returning, or justifiable dismissal of the seamen for habitual bad conduct, are the most common causes from which a forfeiture of wages arises.

As to the former, the statute declares, that every seaman who deserts the ship, forfeits to the owner, all the clothes and effects he may leave on board, and all wages and emoluments to which he might otherwise be entitled; and, in case of desertion abroad, the seaman forfeits all wages and emoluments whatever, which may be or become due, or may be agreed to be paid to him, from or by the owner or master of any other ship, in which the seaman may have engaged for the voyage back to this kingdom. The wages and emoluments so forfeited, must, in the first instance, be applied for the reimbursement of the expense occasioned by the desertion, to the owner or master; and the remainder must be paid to the Seamen's Hospital Society. It is to be deemed desertion, if a seaman is wilfully absent, without permission, from the ship, at any time within twenty-four hours immediately preceding the sailing from any port, either before the commencement, or during the progress of the voyage, or for any period, however short, under circumstances plainly showing that it was his intention to abandon the same, and not to return; but, in order that this forfeiture may effectually take place, the desertion must be entered in the log-book at the time, and certified by the signatures of the master and mate, or one other credible witness. In case of desertion in the United Kingdom, the master delivers up the register ticket of the deserter to the collector or controller at the port.² And the wages, or parts of wages, forfeited for desertion, under this section, can be recovered by the master or by the owner, or his agent, in the same manner as the seaman might have recovered the same, if they had not been forfeited.³

Neglect of duty, disobedience of orders, and habitual

1 Abbot, 643. 2 7 and 8 V., c. 112, § 9. 3 13 and 14 V., c. 93, § 73.

drunkenness, will also deprive a seaman of his wages.⁴ Therefore, where the seaman abused the master in gross terms, and used words of defiance and challenge to him, this misconduct was held a forfeiture of his wages;⁵ and where a mariner, for insolent expressions, and acts of a mutinous tendency, was put in irons, and remained twelve days, until the vessel arrived at St. Helena, and did not then, or at any time before, retract or apologize for his misbehaviour, and was consequently left in custody there,—this amounted to a forfeiture of the wages earned in the former part of the same voyage.⁶ But the wages will not be forfeited by occasional acts of intemperance,⁷ nor by occasional incivility of language,⁸ nor by the seaman abandoning the ship on an alteration of the voyage, by the master, at a foreign port,⁹ nor by a refusal to work on a voyage not specified in the articles of agreement.¹

I next come to the deductions and abatements which have to be made from the seaman's wages; and, of these, the first are the deductions for the Merchant Seamen's Fund, which you are authorised to deduct and retain out of the wages, and which you must, from time to time, pay to the collectors and receivers, as directed by the act.

The next deductions from a seaman's wages are those forfeitures, which may be incurred under the statute regulating merchant seamen. I have already noticed, that, when expenses have been incurred in compelling a seaman to join the ship, and proceed on the voyage, or in recovering him when he has deserted or absented himself, these expenses, not exceeding in any case 40s., are chargeable against the seaman, and may be abated from the wages to grow due to him.² And if, after a seaman has signed the articles, and during the time or period for which he has agreed to serve, he wilfully, and without leave, absent himself from the ship, or otherwise from

4 Abbot. 5 *The Frederick*, Hearn, 4th Dec., 1823; 1 Hag. 211.

6 *The Sarah*; 2 Hag. 329.

7 *New Phoenix*, Lewthwaite, 25th Nov., 1823; 1 Hag. 198.

8 *The Eliza*, 24th July, 1823; Ib. 182. 9 *Ibid*.

1 *Countess of Harcourt*, Bunn, 7th May, 1824; 1 Hag. 248.

2 7 and 8 V., c. 112, § 6.

his duty, he, in all cases, not of desertion, or not treated by the master as such, forfeits to the master or owner, out of his wages, the amount of two days' pay, and for every twenty-four hours of such absence, the amount of six days' pay, or, in the master's option, the amount of the expenses necessarily incurred in hiring a substitute.³

In case, while belonging to a ship, a seaman, without sufficient cause, neglect to perform such of his duty as shall reasonably be required of him, by the master or other person in command, he is subject to the like forfeiture, in respect of every such offence, and of every twenty-four hours' continuance thereof.⁴ Although it is only habitual and aggravated drunkenness that will cause a forfeiture of the whole wages, yet, it is plain, that, under a reasonable construction of this part of the statute, —where a seaman, in consequence of being drunk, is rendered incapable of performing his duty, he subjects himself to the forfeiture here authorised.

And if, after the ship's arrival at her port of delivery, and before her cargo is discharged, a seaman quit the ship, without a previous discharge or leave from the master, he forfeits one month's pay out of his wages.⁵ Under this enactment in the former statute, it has been held, that a seaman absenting himself without leave, after a ship's arrival at her port of discharge, but before delivery of her cargo, subjects himself to this forfeiture of a month's pay; but this absence cannot be treated as a desertion in terms of the act, so as to work a forfeiture of his whole wages.⁶

Where the seaman's wages are contracted to be paid by the voyage, or run, or share, and not by the month, or any other stated period of time, the amount of forfeitures to be incurred by the seaman, must be ascertained as follows:—if the whole time spent on the voyage exceed one calendar month, the forfeiture of one month's pay under the act, is to be accounted, and taken to be, a forfeiture of a sum of money, bearing the same proportion to the whole wages or share, as a calendar month bears to the whole time spent in the voyage; and a for-

³ § 7. ⁴ *Ibid.* ⁵ *Ibid.*

⁶ *M'Donald v. Jopling*, 5th June, 1838; 4 M. W. 285.

feiture of six days' pay, or less, is to be accounted, and taken to be, a forfeiture of a sum bearing the same proportion to the whole wages, as the same period of time bears to the whole time spent in the voyage; if the whole period of time spent in the voyage does not exceed one calendar month, the forfeiture of one month's pay is to be accounted, and taken to be, a forfeiture of the whole wages contracted for; and, if the whole time spent in the voyage, does not exceed the period for which the pay is to be forfeited, the forfeiture is to be accounted and taken as a forfeiture of the whole wages or share.⁷

And, by the Mercantile Marine Act, it is enacted, that, upon every legal conviction of any member of the crew, and upon every infliction of punishment on any such member, and upon the commission of every offence by any such member, for which it is intended to procure punishment to be inflicted, or to enforce a forfeiture, or exact a fine, the master must immediately cause a statement of the offence, and, in the case of a conviction, or of punishment actually inflicted, a statement of such conviction or punishment to be entered in the official log-book,—that entry to be signed by a mate of the ship, or, if there is no mate, by the carpenter, boatswain, or one of the oldest members of the crew;⁸ and no forfeiture can be incurred, under the Merchant Seamen's Act, unless the fact of the seaman's absence, neglect, or refusal, has been duly entered in the ship's log-book,—the truth of which entry must, in all cases of dispute, be substantiated by the evidence of the mate, or some other credible witness.⁹

Whenever any act of misconduct is committed, which, by the agreement under the Mercantile Marine Act, is subject to a fine,—if an entry of the offence is made and attested in the official log-book, in manner above mentioned, and, if the offence is proved to the satisfaction of the shipping master to whom the fine is to be paid,—the appropriate fine must be deducted from the wages of the offender, and the master or owner must pay over every fine so deducted, as follows, viz.—in the case of foreign-going ships, to the shipping master before

7 § 8. 8 § 86. 2 § 7.

whom the crew is discharged; and, in the case of home-trade ships, to the shipping master at or nearest to the place at which the crew is discharged; and any master or owner neglecting or refusing to pay over such fine, is liable, for each offence, to a penalty not exceeding six times the amount of the fine retained by him. But if, before the final discharge of the crew in the United Kingdom, any such offender enters into any of her Majesty's ships, or is discharged abroad, the offence must then be proved to the satisfaction of the officer in command of the ship into which he so enters, or of the consular officer, officer of customs, or other person by whose sanction he is so discharged, and the fine must thereupon be deducted, and an entry of the deduction must then be made in the official log-book, and signed by such officer or other person; and on the return of the ship to the United Kingdom, such fine must, in the case of foreign-going ships, be paid to the shipping master before whom the crew is discharged, and, in the case of home-trade ships, to the shipping master at or nearest to the place at which the crew is discharged.¹

As already remarked, all deductions to be made from a seaman's wages, on any account whatever, must be deducted in the full account delivered by you to the seaman, or to the shipping master, when discharged before such; and no such deduction can be allowed, unless a statement thereof is so made and delivered, except in those cases in which the seamen expressly require to be paid without waiting for an account, and except in respect of any matter happening after such delivery.²

There are only two other subjects—barratry—and responsibility of owners and master—with which I shall close these letters.

I am, &c.

¹ 13 and 14 V., c. 93, § 79.

² § 95.

LETTER XXIV.

Barratry—meaning of the term—loss from this cause—one of the perils insured against—what acts amount to barratry—instances of—what are not—instances of—against whom barratry can be committed—no matter when barratry is committed—but must be during voyage insured—punishment of wilfully destroying or setting fire, &c., to ship—exhibiting false signals, &c.—preventing any person endeavouring to escape—destroying any part of ship—turning pirate—running away with ship, &c.—dismissal of master—retention of certificate by—complaint against master for doing so—what it must state—punishment of—registering vessel of new.

GENTLEMEN,

Before bringing these letters to a close, there is one subject that requires to be treated of, and that is the barratry of the master and mariners. This term barratry, you should be aware, means any act committed by the master or mariners, for an unlawful or fraudulent purpose, or of a criminal or fraudulent nature, or which is grossly negligent, contrary to their duty to their owners, without the owners' consent or knowledge, and done either for the benefit of the master or mariners, or to the injury of the owners of the ship.¹ A loss arising from this cause, is one of the losses for which the underwriter is liable to indemnify the owner; and we must, in the first place, see what acts amount to barratry.

Thus, sailing out of port, without payment of the port duties, whereby the goods were forfeited and lost, is barratry;² or, if the master, without proper authority, and contrary to the orders of his owner, cruise in quest of prizes, this is barratry, though it be done for the benefit of his owner;³ or, if he disregard an embargo;⁴ or, if he attempt to break a blockade, for which the ship

1 1 Park, 189; 2 Arn, 821. 2 Knight v. Cambridge; 3 Str. 1174.
3 Moss v. Byrom, 6 T. R. 379. 4 Robertson v. Ewer, 1 T. R. 127.

or goods are condemned;⁵ or, if he engage in smuggling, without the knowledge and consent of his owner;⁶ or, if the master deviate from the proper course of the voyage, for the purpose of taking in smuggled or contraband goods, on his own account;⁷ or, if he deviate from the voyage, on a private and unlawful adventure of his own,⁸—these are barratry. Or, if the master of a slave ship (when that trade was permitted) sail to an enemy's settlement on the coast, for the purpose of trading to more advantage than he could at a British settlement, and, for doing so, is seized by a British frigate,—this is barratry;⁹ and, where a ship and cargo were barratrously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel;—it was held to be a total loss of the cargo, from the moment the ship was taken out of her course, by the barratrous act of the crew.¹

But when, in the course of the voyage, the master loses his reckoning, and when he discovers his situation, instead of steering directly for his place of destination, bears up to an island out of the course,—this, though a deviation, yet, being without any fraudulent intention, is not barratry;² and, if the master merely mistake the meaning of his instructions, or the best mode of acting for carrying them into effect,—this is not barratry.³ Neither is it barratry, if the master alter the voyage for the benefit of the owners, and with their consent, and without any criminal intention on the part of the master;⁴ neither will an error of judgment, on the part of the master, be construed into barratry;—as, where a vessel having sprung a leak, the master took her into port, and before any survey was made, he broke up her ceiling and end-bows with crowbars, thereby injuring and weakening her,—it was considered that there was a whole ocean between this and barratry.⁵

⁵ *Goldschmidt v. Whitmore*; 3 Taunt. 508.

⁶ *Blankley v. Winstanley*; 3 T. R. 279.

⁷ *Vallejo v. Wheeler*, 1774; Cowp. 143. ⁸ *Ross v. Hunter*; 4 T. R. 33.

⁹ *Earl v. Rowcroft*; 8 East, 126.

¹ *Dixon v. Read*, 25th April, 1822; 5 B. A. 597.

² *Phyn v. Ro. Ex. Ass. Co.*; 7 T. R. 505.

³ *Bottomly v. Bovill*, 4th February, 1826; 5 B. C. 210.

⁴ *Stamma v. Brown*; 2 Stra. 1173. ⁵ *Todd v. Ritchie*; 1 Stark. 240.

Again, with respect to the parties against whom acts of barratry may be committed,—the general rule is,—that barratry can only be committed against the owners, and, therefore, not with their consent;⁶ and it follows, that, if the master be both master and sole owner, he cannot commit barratry against himself,⁷ and it would seem, that if one part-owner be master, he cannot commit barratry against another part-owner.⁸ A general freighter of the vessel is held to be the owner of her for that particular voyage; and, therefore, barratry can be committed against him, even though the barratrous act be committed with the consent of the actual owners of the ship.⁹

It is a matter of no moment, whether the loss happen during the time of committing the act of barratry, or during the course of the fraudulent voyage or deviation, or after the vessel has again returned to her regular course;¹ but, it must happen during the course of the voyage insured, and within the time limited in the policy—generally twenty-four hours after being moored in good safety; and, therefore, where the master had been guilty of smuggling, and the vessel arrived on 1st Sept., and lay in safety until the 27th, when she was seized for the smuggling,—the underwriters were held not liable for the loss.²

These are the more common instances of barratry; and although none of these are crimes punishable by law, yet, the same term is applied to other and more heinous acts,—as, wilfully destroying or setting fire to the ship, &c.,—which, in this country, are severely punishable by statute.

By one statute, it is enacted, that, “if any person “shall unlawfully and maliciously damage, otherwise “than by fire, any ship or vessel, whether in a complete “or unfinished state, with intent to destroy the same, or “to render the same useless,—every such offender shall “be guilty of felony; and, being convicted thereof, shall “be liable, at the discretion of the court, to be trans-

6 2 Mar. 529; 2 Arn. 831. 7 Nutt v. Bourdieu, 1 T. R. 723.

8 1 Park, 209; 2 Arn. 832. 9 1 Park, 190.

1 1 Park, 189. 2 Lockyer v. Offley, 1786; 1 T. R. 252.

"ported beyond the seas for the term of seven years, and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such punishment."³ By a more recent statute, it is also enacted, "that, whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy, any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and, being convicted, shall suffer death."⁴

By this statute, it is also enacted, "that, whosoever shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do anything tending to the immediate loss and destruction of any ship or vessel in distress, shall be guilty of felony, and, being convicted thereof, shall suffer death."⁵

It also enacts, that, "whosoever shall unlawfully and maliciously set fire to, or in anywise destroy, any ship or vessel, whether the same be complete, or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy, any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten, or shall underwrite, any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas for the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."⁶

The same statute also enacts,—“that whosoever shall, by force, prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, (whether he shall have been on board or have quitted the same,) shall be guilty of felony, and, being con-

3 7 and 8 Geo. IV., c. 30, § 10. 4 7 Wm. IV. and 1 V., c. 89, § 4.
5 § 5. 6 § 5.

“victed thereof, shall be liable, at the discretion of the court, to be transported beyond seas, for the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.”⁷ And also, “that, whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast ashore, or any goods, merchandise, or articles of any kind, belonging to such ship or vessel, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas, for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years.”⁸

Again, as to the offences of turning pirate, running away with the ship or cargo, or making a revolt in the ship, an English statute enacted, “that, if any commander, or master of any ship, or seaman, or mariner, shall, in any place where the admiral hath jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandises, or yield them up voluntarily to any pirate, or shall bring any seducing messengers from any pirate, enemy, or rebel, or consult, combine, or confederate with, or attempt, or endeavour to corrupt any commander, master, officer, or mariner to yield up, or run away with, any ship, goods, or merchandise, or turn pirate, or go over to pirates,—or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or shall confine his master, or make or endeavour to make a revolt in the ship,—he shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and, being convicted thereof, according to the directions of this act, shall have and suffer pains of death, loss of lands, goods, and chattels, as pirates, robbers, and felons on the seas ought to have and suffer.”⁹ And, by a recent statute,

⁷ § 7. ⁸ § 8.
9 11 and 12 Wm. III., c. 7, § 9, made perpetual by 6 Geo. I., c. 9.

it is enacted, "that, persons convicted of any offence, "which, by the acts referred to in this section, amounts "to piracy, shall be liable to be transported for life, or "for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."¹

Having thus detailed to you the punishments of these crimes, I will close this letter with a matter which may be considered more personal to yourselves. I need not tell you, that the very full and almost unlimited trust reposed in a shipmaster is checked by the right which his owners have to dismiss him, when and where they please, and without giving any reasons for their doing so,—leaving him, should he be improperly dismissed, to his remedy, by a claim of damages for their doing so. But, although they have this power, the master may attempt to defeat it, and to keep possession of the ship, by withholding the certificate of registry of the vessel, so as a new master cannot be legally appointed. To meet this, the registry act has provided a remedy.

By section 30 of that statute, it is enacted that, in case any person who has received, or obtained, by any means, or for any purpose whatever, the certificate of registry, whether that person claim to be master or owner, shall wilfully detain and refuse to deliver up the same to the proper officer of customs, for the purposes of the vessel, as occasion may require, or to the person having the actual command, possession, and management of the vessel, as the ostensible and reputed master or owner, either of the latter can make a complaint on oath, of such detainer and refusal, to any justice of the peace residing near to the place where such detainer and refusal shall be, in Great Britain or Ireland, or to any member of the supreme court of justice, or any justice of the peace in the islands of Jersey, Guernsey, or Man, or in any colony, plantation, island, or territory, belonging to her Majesty, in Asia, Africa, or America, or in Malta, Gibraltar, or Heligoland, when such detainer and refusal is in any of these last-mentioned places; and on this complaint being made, the justice or other magistrate, by warrant under his hand and seal, causes the person

¹ 7 Wm. IV. and 1 V., c. 88, § 3.

complained against to be brought before him to be examined, touching the refusal and detainer.² But the complaint against the master for thus unlawfully detaining the certificate, must state the purpose for which the certificate is required, and to what officer of the customs the master has refused to deliver it.³

If it appear, on the examination, that the certificate of registry is not lost or mislaid, but is wilfully detained, the person is to be convicted thereof, and he forfeits and pays the sum of £100; and, on failure of payment, he is to be committed to the common gaol, there to remain, without bail, for such time as the justice or magistrate may, in his discretion, deem proper, not being less than three, or more than twelve months.⁴

The justice or magistrate certifies the detainer, refusal, and conviction, to the persons who granted the certificate of registry for the vessel, who, on the terms and conditions of the law being complied with, can make registry of the vessel of new, and grant a certificate of registry thereof, conformably to law, certifying on the back of the certificate, the ground on which the vessel has been registered of new. Or, if the person who has detained and refused to deliver up the certificate, or is verily believed to have done so, shall have absconded, so that the warrant cannot be executed upon him, on proof thereof being made to the satisfaction of the commissioners of customs, they can permit the vessel to be registered of new, or otherwise, in their discretion, grant a license for the present use of the vessel, in the same manner as where the certificate is lost or mislaid.⁵

I am, &c.

² 8 and 9 V., c. 89, § 30.

³ *The King v. Walsh*, 23rd May, 1834; 1 A. E. 481.

⁴ § 30.

⁵ § 30.

LETTER XXV.

Responsibility of owners and master—of owners, for repairs, &c.—general rule—who liable as owners—responsibility for money borrowed—for contracts in employing vessel—limitation of—under exceptions in charter-party and bills of lading—further limitation of—by statutes—first statute—second statute—exemptions of fire—does not apply to small craft—third statute—enactments of—mode of ascertaining value—what included—several losses—proceedings for ascertaining value of ship, appurtenances, and freight—affidavit to be made—responsibility under pilots' act—masters and mariners excepted from two statutes—liability of master for repairs, &c.—and for contracts of carriage—conclusion.

GENTLEMEN,

I have reserved, until this last letter, the consideration of an important subject—viz., the responsibility of the owners and master of the vessel. Let us take, first, the responsibility of the owners, which may be either for repairs and necessities,—for money borrowed by the master,—or to the shippers of goods.

It has been already repeatedly mentioned, in the course of these letters, that, in a foreign port, and in places where the owners do not reside, and have no agent, the master is their sole accredited and recognised agent, in making necessary repairs, in victualling and in fitting out the vessel, and for such repairs or supplies as are reasonably fit and proper for the occasion, the owners are liable. The general rule is, "that whatever is fit and proper for the service on which the vessel is engaged,—whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term 'necessary,' as applied to repairs done, or things provided for the ship, by the order of the master, for which the owners are liable."¹

¹ Webster v. Seekamp, E. T. 1821; 4 B. A. 352.

This is the common rule, where the master has been appointed by the owners, and there is no question as to the legal ownership. But it is not a general rule, that those whose names appear on the register, as registered owners, are liable for repairs done, or furnishings supplied to the vessel, because the registered owners may have sold their interest in the vessel, although the title of the purchaser has not been completed;² or the vessel may have been let under charter-party for a certain specified period, with an obligation on the charterer to keep the vessel in repair during that period;³ or the repairs may have been ordered by a master who has been appointed by a stranger to the registered owners.⁴ In these and the like cases, the true question is, upon whose credit was the work done? But where there is no dispute as to the liability, the owners will not be discharged, although the master may have been supplied with money to pay for the necessary repairs, furnishings, or supplies, if he has not actually paid for them.⁵

As to the owner's responsibility for money borrowed by the master abroad, the general rule is,—that, where the master necessarily borrows money to pay for repairs, stores, or furnishings, which he cannot otherwise procure on the credit of himself, or his owners, or where it is so borrowed for the further prosecution of the voyage, the owners are liable to the lenders.⁶ But this must not be understood of an indefinite supply of cash, with which the master may do as he pleases;—the lender must see that the money lent is warranted by the necessity, which the master has authority only to supply,⁷ and the money must be advanced to the master expressly for the use of the ship.⁸ But, as this matter has been already fully treated in the course of these letters, it need not here be resumed.

The power of the master of a general ship, in employing her, has also been already treated of; and the owners

² *Trewhella v. Rowe*, 1809; 11 East, 435.

³ *Fraser v. Marsh*, 1811; 13 East, 259. *Reeve v. Davies*, 6th May, 1834; 1 A. E. 312.

⁴ *Jennings v. Griffith*, 1825; 1 R. M. 42. ⁵ *Abbot*, 135.

⁶ *Abbot*, 139. ⁷ *Rocker v. Bushner*; 1 Stark. 27.

⁸ *Thacker v. Moates*; 1 M. M. 79.

are bound by all contracts made by the master, in the usual course of that employment.⁹ They are, therefore, responsible to the shippers for their goods, and for the acts of the master; and, should any of the goods be lost or damaged, they are liable for the value.¹ Even where the master employed a broker, to advertise the vessel as a general ship, and the broker advertised her to sail with convoy, but this was not complied with,—the owners were held liable.² In the cases in which the master can enter into a charter-party, in his own name, in a foreign port, in the usual course of the vessel's employment, as mentioned in a previous letter,—the owners are liable to the shippers under that contract.³

But, under the exceptions in the charter-party and the bills of lading, the owners and master are exempted from liability in certain cases;—as, first, from loss by an event falling within the meaning of the expression, “act of God and the Queen's enemies.” The act of God comprehends all accidents arising from an inevitable peril, or from physical causes, as distinguished from those arising from the agency of man—such as natural accidents, arising from tempests, hurricanes, lightning, or earthquakes, or from the plague, or an epidemic contagion among the crew.⁴ For these, the master and owners are not liable; but for accidents arising from the negligence of man, or which it could have been in the power of man to prevent,—the owners are responsible;—as, where a collision happens through negligence, or the vessel is run on a rock or shallow, through unskilful or negligent navigation, or where an accident is occasioned by want of lights during the night, in a place where, by the usage of the navigation, they are required. In order to excuse the master and owners, however, the act of God must be the immediate, and not the remote cause of the loss or accident.⁵ Secondly, from “the perils and dangers of the seas, and accidents of the seas, rivers, and navigation.” The meaning of the expression, “perils of the sea,” &c., is understood to

⁹ Abbot, 124. ¹ Ellis v. Turner, 1800; 9 T. R. 831.

² Ringuet v. Ditchell, 1800; Abbot, 128. ³ Abbot, 126.

⁴ Abbot, 382; Holt, 411. ⁵ Smith v. Shepherd; Abbot, 382.

comprehend all accidents arising from the winds and seas, which could not be prevented by the skill and care, or by the precaution or foresight of the master or mariners;—as, where a vessel strikes on a rock, runs on a sandbank, or comes in accidental collision with another vessel, and when no blame, fault, or ignorance, unskillfulness, or negligence can be imputed to the master or mariners. Thus, where a vessel was run foul of in daylight, and not in a storm, by one of two ships, but there was no blame or fault attributable to any one,—this was held to fall within the meaning of this exception, and to have happened by a peril of the sea, so as to relieve the owners from liability for the goods.⁶ Robbery by pirates, or from a ship at sea, or in a river, is also held to fall under this exception; and so, also, where goods are plundered by the inhabitants, on the ship being driven on shore.⁷ The third exception is, “the restraints of rulers and princes,” and this is chiefly exemplified in the case of an embargo; but it must be an actual and operative restraint, not merely an expected and contingent one, which will excuse the non-performance on the part of the master and owners.⁸

But, by certain statutes, the responsibility of owners is further limited; and these statutes I will now detail in their order.

The first is the 7th Geo. II., c. 15, passed in the year 1734, which enacts,—first,—that no owner of any ship or vessel shall be subject, or liable to answer for, or make good to any one or more person or persons, any loss or damage by reason of any embezzling, secreting, or putting away with, by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, which are shipped, taken in, or put on board any ship or vessel, or for any act, matter, or thing, damage, or forfeiture, done, occasioned, or incurred by the master or mariners, or any of them, without the privity and knowledge of the owners, further than the value of the vessel, with all her appurtenances, and the full amount of the freight due, or to

⁶ *Buller v. Fisher*, 1800; 3 Esp. 67. ⁷ *Abbot*, 385.

⁸ *Aitkenson v. Ritchie*: 10 East, 536.

grow due, for and during the voyage, wherein such embezzlement, secreting, or making away with, as aforesaid, or other malversation of the master or mariners, has been made, committed, or done.⁹ And, if several freighters sustain losses, exceeding in whole the value of such ship and freight, they are to receive compensation out of the same, in proportion of their respective losses.¹ This statute only limited the owner's responsibility for the acts of their servants; but the legal responsibility was left unaltered, for acts done by persons not belonging to the ship.

By a subsequent statute, the responsibility of the owners was limited to the same extent, by reason of any robbery, embezzlement, secreting, or making away with, any gold, &c., or any goods or merchandise, shipped on board, or for any act, forfeiture, or damage done or incurred, "though the master or mariners shall not be in anywise concerned in, or privy to, such robbery, embezzlement, secreting, or making away with."² The same statute also enacts, that no owner shall be subject or liable to answer for, or make good to any person or persons, any loss or damage which may happen to any goods or merchandise shipped, taken in, or put on board any ship or vessel, by reason or means of any fire happening to, or on board of, any such ship or vessel.³ It has been held, that this section relates only to ships usually occupied in sea voyages, and not to small craft, lighters, and boats, concerned in inland navigation; and that a gabbart or lighter is not a ship or vessel, within the meaning of this section; and, therefore, if goods on freight, shipped on board such, are destroyed by fire, accidentally, or through negligence of the master, &c., the owners are not protected by the statute, but are responsible at common law.⁴

The same statute also enacts, that no master, owner or owners, of any ship or vessel, are subject or liable to answer, or make good, to any one or more person or persons, any loss or damage, that may happen to any gold, silver, &c., which may be shipped, taken in, or put

9 § 1.

1 § 2.

2 26 Geo. III., c. 86, § 1.

3 § 2.

4 Hunter v. McGowan; 1 Bligh, 573.

on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare, in writing, to the master, owner, or owners of the ship or vessel, the true nature, quality, and value of such gold, silver, &c.⁵ This act contains similar provisions with the former, as to the value of the vessel and freight being insufficient to compensate for the losses, and as to the recovery of these. And, by the last statute, the responsibility of owners of vessels is further limited. It enacts, that no sole or part-owner or owners of any vessel, are subject or liable to answer for, or make good, any loss or damage arising or taking place, by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandise, or other things, laden or put on board the same ship or vessel, or which may happen to any other ship or vessel, or to any goods, &c., being in or on board of any other ship or vessel, further than the value of the vessel and the freight due, or to grow due, for and during the voyage which may be in prosecution, or contracted for, during the time of the loss or damage happening.⁶

Under this section, it has been held, that the owners are not liable, in that character, beyond the value of the ship and freight due, or to grow due, although the loss was occasioned by the fault of one of the owners, who was also master; that the value of the ship was to be calculated at the time of the loss taking place, and not at the time of the commencement of the voyage; and that in calculating the value of the freight due, or to grow due, money actually paid in advance was to be included; as the words freight, &c., were meant to comprehend all the freight for the voyage, and that it makes no difference whether the freight was paid in advance or not.⁷ In the value of the vessel, are to be included, the fishing stores of a ship employed, in the usual manner,

⁵ § 3.
⁶ 53 Geo. III., c. 159, § 1.

⁷ *Wilson v. Dickson*, 6th November, 1818; 2 B. A.

in the Greenland fishery, belonging to the owners;⁸ in the chronometer of a whaler.⁹ The freight is to be estimated, not as at the commencement of the voyage, but at the amount which was, or might have been, earned by the voyage, had it been completed, and diminished by jettisons or other losses.¹ This clause, limiting the responsibility of the owners to the value of the ship, appurtenances, and freight, applies only to the original damages found due, and does not extend to the interest and expenses in which the owners may be found liable to the other party.²

And the value of the carriage of any goods, &c., belonging to the owner or owners of the vessel, and also the hire due, or to grow due, under or by virtue of any contract—except only such hire, as, in the case of a ship or vessel hired for time, may not begin to be earned until after the expiry of six calendar months after the loss or damage has happened—is to be deemed and taken to be, and considered as, freight, within the intent and meaning, and for the purposes, of the act, and also of the two other acts before mentioned.³

In case any loss or damage should arise or happen, by one or more separate or distinct accident, act, neglect, or default, or on more than one occasion, in the course or progress of a voyage, or after the end of any voyage, and before the commencement of another voyage,—each and every such loss or damage is to be paid, compensated, and satisfied, according to the provisions of the act, in such and the same way, and to the same extent, as if no other loss or damage had happened or arisen during the same voyage, or after the end of any voyage, and before the commencement of another voyage.⁴

But, if several persons suffer any loss or damage, in or to their goods, &c., ship, or otherwise, by any means, for which the responsibility of any owner or owners is limited by the act, and the value of the vessel, with all her appurtenances, and the amount of freight estimated as aforesaid, are not sufficient to make full compensation

⁸ *Gale v. Lawrie*, 26th January, 1826; 5 B. C. 156.

⁹ *Langton v. Norton*; 6 Jurist, 910.

¹ *Cannan v. Maeburn*, 1824; 1 Bing, 465.

² *Dundee, Holmes*, 10th Dec., 1827; 2 Hag. 137. ³ § 2. ⁴ § 3.

for all and every the person suffering loss and damage, the person or persons liable to make satisfaction for the loss or damage, or any one or more of them, on behalf of himself, and the other owner or owners of the same vessel, can take proceedings in any court of equity, having competent jurisdiction, against all the persons who have brought actions of damages, and all other persons who may claim to be entitled to any recompense for the loss or damage arising, or happening by the same separate and distinct accident, act, neglect, or default, or on the same occasion,—to ascertain the amount of the value of the ship or vessel, appurtenances, and freight, and for the payment or distribution thereof, rateably among the several persons claiming recompense as aforesaid, in proportion to the amount of the several losses or damages sustained by them, according to the rules of equity, and as the case may require.⁵

The person making this application, however, must make an affidavit that he is not, directly or indirectly, colluding with any of the other parties, or with any of the other owner or owners of the same vessel, or with any other person or persons, but that the proceedings are adopted for the purpose only of justice, and to obtain the benefit of the act; and that the several persons named in the application are, as he believes, all the persons claiming to be entitled to recompense for loss or damage sustained by the same accident, &c., or upon the same occasion;—that all these persons do claim recompense, and are entitled to proportions of the value of the vessel, appurtenances, and freight;—that no other person claims to be entitled to any proportion thereof, under the provisions of the act;—that the amount of the value of the ship, appurtenances, and freight does not exceed a sum to be specified in the affidavit;—and that the several claims made for recompense exceed the amount of that value. The party adopting these proceedings may apply to the court, and obtain an order, for leave to pay into court, the amount of the value of the vessel, appurtenances, and freight, as ascertained by the affidavit, and must pay the same into court according

to order; or, in special cases, the court may order security to be given for the amount, and, failing such payment or security, the application is to stand dismissed.⁶

In passing, it may be necessary to observe, that, under the general pilotage act, no owner or master of any ship or vessel is answerable for any loss or damage, which may happen to any person or persons whomsoever, from, or by reason, or means of, any neglect, default, incompetency, or incapacity, of any licensed pilot, acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of that act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot offers to take charge thereof.⁷ But I should think that this section of the general pilotage act cannot be extended to the case of masters or mates, qualified to pilot their own vessels, under the recent statute.

In the statute first before referred to, it is specially enacted, that nothing in that act shall extend or be construed to extend, to impeach, lessen, or discharge any remedy against all, or every, or any, the master and mariners of any ship or vessel, for or in respect of any embezzlement, secreting, or making away with any gold, silver, &c., or merchandise shipped or laden on board such ship or vessel, or on account of any fraud, abuse, or malversation of or in such master and mariners, respectively; but every person so injured or damaged, can pursue and take such remedy for the same, against the said master and mariners respectively, as could have been done before the making of that act.⁸

And, by the last statute, limiting the responsibility of shipowners, it is specially enacted, that "nothing herein contained shall lessen, or take away, any responsibility to which any master or mariners of any ship or vessel may now, by law, be liable, notwithstanding such master or mariners may be an owner, or part-owner, of his ship or vessel."⁹ But, if goods are delivered to a master, to be conveyed by his vessel, and he is to receive the

6 § 4. 7 6 Geo. IV., c. 125, § 55. 8 7 Geo. II., c. 15, § 4.
9 53 Geo. III., c. 159, § 4.

■ freight for his own use, the owners are not liable for
 ■ the embezzlement of these goods.¹

■ The master is personally liable for all repairs done, or
 ■ goods furnished to the vessel, upon his orders, to the
 ■ persons by whom the repairs are done, or goods furnished,
 ■ unless he has taken care, at the time, to free
 ■ himself from all personal responsibility.² And, as a
 ■ common carrier, he is also answerable for all contracts
 ■ which he makes for the employment of the ship, and to
 ■ the shippers of goods, for the goods shipped by them;³
 ■ and, it has been held, that the master is answerable for
 ■ the loss of goods, occasioned by a seizure of the ship, for
 ■ a supposed breach of the revenue laws, though, in the
 ■ result, it was found, that there was no cause for condemnation.⁴ But, in an action against him by shippers, he
 ■ has the same benefit of the exceptions in the charter-
 ■ party and bill of lading, as the owners have.

In closing these letters, I may be permitted to hope, that I have brought under your notice almost everything necessary for you to know, of your duties as a master, a servant, a steward, and an agent. These duties are arduous, and, in many cases, difficult;—the responsibility, which attaches to your situation, is great;—and, being well informed as to these duties, and that responsibility, must be to you a matter of the last importance. But, in all things, and in every situation, your conduct ought to be candid and straightforward, and your intentions honest and upright; and, when they are so, you may almost always depend upon receiving the approbation of your owners, and of the underwriters, whatever may be the result. I would earnestly recommend these letters to your attentive and careful perusal; and I may be allowed to flatter myself, that, were the authorities there quoted and referred to, more familiar to shipmasters, and more attentively and industriously followed by them, than, in the great majority of cases, they now are,

1 Boucher v. Lawson, Rep. Temp. Hardwicke, 85. 2 Abbot, 40.
 3 Abbot, 124; Holt, 217. 4 Goaling v. Higgins; 1 Camp. 451.

there would be less grounds and fewer causes for complaint against their conduct and actions than there are, I am afraid, at present, too good reasons for, while, at the same time, the master himself could act with more knowledge, certainty, and confidence.

I am, &c.

THE END.

WEIGHT AND VALUE
OF
GOLD AND SILVER FOREIGN COINS.

UNITED STATES OF AMERICA.		dwts.	grs.	Eng. value.		
GOLD.				£	s.	d.
<i>National Denominations.</i>						
Double Eagle of 10 Dollars.....	11	6		2	3	9½
Eagle of 5 Dollars.....	5	15		1	1	10½
Half Eagle (2½ Dollars).....	2	19½		0	10	11½
SILVER.						
Dollar	17	10		0	4	3½
Half Dollar.....	8	17½		0	2	1½
Quarter Dollar	4	8½		0	1	0½
FRANCE.						
<i>New Coin.</i>						
GOLD.						
20 Franc Piece	4	3½		0	15	10½
40 Do.	8	7		1	11	8½
SILVER (ARGENT BLANC.)						
5 Franc Piece.....	16	1		0	4	0
2 Do.	8	11		0	1	7
1 Do.	3	5½		0	0	9½
½, or 50 Centimes	1	15		0	0	4½
¼, or 25 Centimes	0	18½		0	0	2½
AUSTRIA AND BOHEMIA.						
GOLD.						
Emperor's Ducat	2	5½		0	9	5
Hungarian Ducat	2	5½		0	9	5½
Half Sovereign	3	7½		0	14	9
Quarter Sovereign	1	15½		0	7	4½
SILVER.						
Crown	18	1		0	4	1½
Half Rix-dollar, or Florin	9	0½		0	2	0½
20 Kreutzers	4	6½		0	0	8½
10 Do.	2	3½		0	0	4

SPAIN.

GOLD.

National Denominations.

	dst.	grs.	Eng. value.
	£	s.	d.
Doubloon of 8 Crowns, 1772 to 1786.....	17	9	3 6 7
4 Crowns	8	16½	1 13 3½
2 Crowns.....	4	8½	0 16 7½
Half-pistol, or Crown	2	4½	0 8 3½
Doubloon of 8 Crowns, since 1786	17	9	3 4 8
4 Crowns.....	8	16½	1 12 4
2 Crowns.....	4	8½	0 16 2
Half-pistol, or Crown	2	4½	0 8 1

SILVER.

Piaster, since 1772	17	8	0 4 3½
Real of 2, or Peseta, or one-fifth of a Piaster.....	3	18	0 4 10½
Real of 1, or Half-peseta, or one-tenth of do....	1	21	0 0 5½
Realillo, or one-twentieth of a Piaster	0	22½	0 0 2½

These three last Coins have currency in the Peninsula only.

PORTUGAL.

GOLD.

Lisbonine, or Moldore of 4800 Reis	6	22	1 16 11½
Half Do. of 2400 Reis	3	11	0 13 5½
Quarter Do. of 1200 Reis	1	17½	0 6 8½
Portuguese, or Moiadobra of 6400 Reis	9	5½	1 15 11
Half Portuguese of 3200 Reis.....	4	14½	0 17 10½
Piece of 16 Testons, or 1600 Reis	2	7½	0 8 11½
Do. of 12 Testons, or 1200 Reis.....	1	17½	0 6 4½
Do. of 8 Testons, or 800 Reis.....	1	3½	0 4 5½
Cruzada of 480 Reis.....	0	16½	0 2 7½

SILVER.

New Cruzada of 480 Reis.....	9	1	0 4 11
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SWEDEN.

GOLD.

Ducat	2	5	0 9 3½
Half Do.	1	2½	0 4 7½
Quarter Do.....	0	18½	0 2 3½

SILVER.

Rix-dollar of 48 Shillings, from 1720 to 1802 ...	18	17	0 4 6
Two-thirds of Rix-dollar of 32 Schillings.....	12	11½	0 3 0
One-third, or 16 Schillings	6	5½	0 1 6

HAMBURG.

GOLD.

Ducat ad Legem Imperii.....	2	5½	0 9 4½
New Town Ducat	2	5½	0 9 4

SILVER.

Mark Banco, (imaginary)			0 1 5½
16 Schilling Piece, Convention	5	20	0 1 2½
Rix-dollar Specie	18	18	0 4 7

HOLLAND AND THE NETHERLANDS.**GOLD.***National Denominations.*

	dwt.	grs.	Eng. value.
			£ s. d.
Ducat	2	5½	0 9 5½
Ryder	6	10½	1 5 1½
20 Florins, 1808.....	9	7½	1 14 2½
10 Florins	4	15½	0 17 1½
10 Williams, 1818	4	7½	0 16 5½

SILVER.

Florin	6	22	0 1 8½
Escalin (6 Sous).....	8	4½	0 0 6
Ducaton, or Ryder	20	22	0 5 5
Ducat, or Rix-dollar	18	6	0 4 4

The Florin is divided into 20 Sous, and the Sou
into 5 Cents.

DENMARK.**GOLD.**

Ducat, current since 1787	2	0	0 7 6
Ducat specie, 1791 to 1802	2	5½	0 9 4½
Christian, 1773	4	7	0 16 7

SILVER.

Rix-dollar, or Double Crown, of the value of 96 Danish Schillings of 1776	18	14	0 4 6
Rix-dollar, or Piece of 6 Danish Marks of 1760.....	17	6	0 4 0
Danish Mark of 16 Schillings of 1776	4	0	0 0 7½

PRUSSIA.**GOLD.**

Ducat	2	5½	0 9 4
Frederick	4	7	0 16 6
Half Do.	2	3½	0 8 3

SILVER.

Rix-dollar, or Thaler of 30 Silbergroschen, 1823	14	6½	0 2 11½
Piece of 5 Silbergroschen	2	9	0 0 5½
Silbergros			0 0 0½

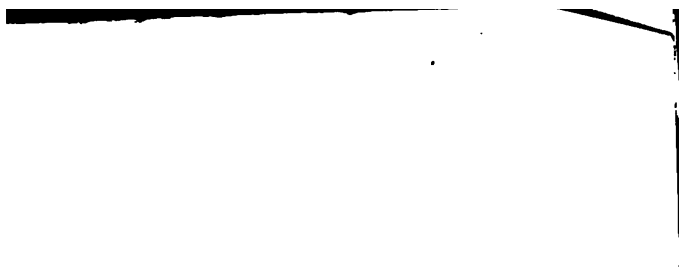
MOGUL (EAST INDIES.)**GOLD.**

Mohur of Bengal	7	23	1 13 8
Do. of Bombay	7	10½	1 10 1
Gold Rupee, Bombay	7	11	1 9 2
Do. of Madras	7	12	1 9 3
Star Pagoda, Madras	2	4½	0 7 6

SILVER.

Rupee, Sicca	7	12	0 2 0½
Do., Arcott.....	7	9	0 1 11½
Do., Bombay	7	11	0 1 11
Do., Broach	7	10	0 1 9

GEORGE PHILIP AND SON, PRINTERS, LIVERPOOL.



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